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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER A. MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET. AL.
Petitioner,

v.

MARK JAMES ASAY
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BILL McCOLLUM
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Assistant Deputy Attorney General

CHARMAINE M. MILLSAPS
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)

*Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

Whether the Eleventh Circuit abused its discretion in denying an interlocutory appeal where the district court had found equitable tolling of the statute of limitations based on habeas counsel's "malfeasance" contrary to 28 U.S.C. § 2254(i) which precludes relief based on ineffectiveness or incompetence of habeas counsel?

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OPINION BELOW

The opinion of the district court granting equitable tolling is unreported but is included as Appendix A. (App A-3 - A-65).

JURISDICTION OF THE SUPREME COURT

The order denying the interlocutory appeal was issued on March 18, 2009. A motion for rehearing was filed on April 7, 2009. The Eleventh Circuit denied rehearing on April 20, 2009. Justice Thomas granted an extension of time to file this

petition. The petition for writ of certiorari was filed on August 18, 2009. The petition is timely. *See* Sup. Ct. R. 13.3 (. . . if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.); 28 U.S.C. § 2101(c).

Jurisdiction exists pursuant to 28 U.S.C. § 1254(1). See also Wright & Moore, Federal Practice & Procedure § 4034, 4036 (noting the "appellate jurisdiction of the Supreme Court extends to virtually every case that comes into a federal court" and observing that "once a case has come to be in a court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions or procedural rulings, and may even grant review before the court of appeals has taken any action at all."); *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (noting there is no absolute bar to review of nonfinal judgments of the lower federal courts citing R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 4.18 (7th ed.1993)(citing cases).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal habeas statute of limitations, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual

> predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The federal habeas statute, 28 U.S.C. § 2254(i), provides:

> The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Asay was convicted of the July 17, 1987 murders of Robert Lee Booker and Robert McDowell and was sentenced to death for both murders. The facts of this capital case are recounted in the Florida Supreme Court's direct appeal opinion. *Asay v. State*, 580 So.2d 610, 610-612 (Fla.1991).

Asay filed an untimely federal habeas petition in the Middle District of Florida. His petition was over six months late. Asay's federal habeas petition had to be filed by Monday, January 17, 2005, to be timely. The petition was not, in fact, filed until August 15, 2005. (Doc. #8). On September 2, 2005, Respondents filed a limited response asserting that the petition was untimely and the case should be dismissed. (Doc. #13). The district court conducted two oral arguments on the issue of timeliness - one on January 18, 2006 and the other on December 17, 2007. The district court also ordered supplemental briefing on numerous occasions. On February 21, 2008, the district court conducted an evidentiary hearing on whether equitable tolling of the habeas statute of limitations was warranted. After supplemental briefing, the district court found equitable tolling based on attorney "malfeasance." The finding of malfeasance was based on habeas counsel's misunderstanding of a case; her failure to obtain Asay's personal consent to intentionally missing the federal deadline which caused, in the district court's view, "divided loyalties"; an unidentified

injury of unknown nature and duration and the stress from a family member's chronic illness.

Petitioners' position was that habeas counsel intentionally missed the federal deadline to litigate the issue of equitable tolling and to cause delay just as she had done previously in *Lawrence v. Florida*, 549 U.S. 327 (2007). The district court gave this view of habeas counsel's conduct "some credence" but equitably tolled the statute of limitations regardless. Petitioners also asserted that equitable tolling could not be based on habeas counsel's conduct because the statute, 28 U.S.C. § 2254(i), precludes a finding of equitable tolling based on ineffectiveness of habeas counsel.

The district court certified the question of whether equitable tolling was warranted for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Petitioners appealed to the Eleventh Circuit. The Eleventh Circuit denied the petition for permission to file an interlocutory appeal. Petitioners seek review of the Eleventh Circuit's denial of an interlocutory appeal in this Court.

REASONS FOR GRANTING THE PETITION

WHETHER THE ELEVENTH CIRCUIT ABUSED ITS DISCRETION IN DENYING AN INTERLOCUTORY APPEAL WHERE THE DISTRICT COURT HAD FOUND EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS BASED ON HABEAS COUNSEL'S "MALFEASANCE" CONTRARY TO 28 U.S.C. § 2254(I) WHICH PRECLUDES RELIEF BASED ON INEFFECTIVENESS OR INCOMPETENCE OF HABEAS COUNSEL?

The Eleventh Circuit abused its discretion by denying the request for an interlocutory appeal of a district court's order finding equitable tolling in a capital case based on habeas counsel's "malfeasance" in violation of the statutory prohibition on granting relief based on ineffectiveness of postconviction counsel contained in 28 U.S.C. § 2254(i). There is a significant conflict among the circuit courts of appeal on whether the AEDPA statute of limitations may be equitably tolled in light of the prohibition contained in 28 U.S.C. § 2254(i). Six circuit courts have addressed the issue and taken three different positions. Some circuits take the position that equitable tolling is always warranted in a capital case where the attorney misses the deadline because it is a capital case. Other circuits take the position that equitable tolling may not be based on attorney conduct whether labeled malfeasance or

not. The remaining circuits take the position that equitable tolling is warranted if the attorney's conduct is "egregious" or amounts to "malfeasance" but in most of these cases the only malfeasance is missing the deadline. Most of these circuit decisions conflict with this Court's traditional equitable tolling jurisprudence which looks to the text of the relevant statute to determine if equitable tolling is authorized. These circuits' decisions do not employ this Court's analysis or caselaw. The decisions are not in line with this Court's equitable tolling caselaw. These decisions also conflict with the text of the habeas statute, § 2254(i), which forbids any relief, including equitable tolling, on the basis of ineffective assistance of postconviction counsel. Finally, these decisions conflict with this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991). This Court should grant review to resolve this conflict among circuits and the conflict with this Court's caselaw.

Importance of the issue

This Court has pointedly left open the question of whether equitable tolling applies to the federal habeas statute. *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)(assuming, without deciding that equitable tolling applies to the AEDPA because the parties did so); *Pace v. DiGuglielmo*, 544 U.S. 408, 418, n. 8 (2005)(noting the availability of equitable tolling is an open question that has never been addressed by the Supreme

Court). Indeed, the topic has generated a recent law review article. Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 Md. L. Rev. 545, 548 (2009)(noting that the question is open and observing that the "the Court now appears poised to answer it"; applying more the traditional analysis and concluding the AEDPA is subject to equitable tolling but not addressing the issue of equitable tolling in the specific basis of attorney conduct and the statutory language of § 2254(i)); see also Lisa L. Bellamy, *Playing For Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 Am. J. Crim. L. 1 (2004). This case presents an opportunity for this Court to address one aspect of this open question.

This issue is of critical importance to the States because it impacts the finality of state criminal convictions. Thirty-two States have previously urged this Court to address the issue of equitable tolling of the AEDPA statute of limitations. See Brief for 32 States as amici curiae in support of the petition in *Belleque v. Kephart*, 127 S.Ct. 1880 (2007)(No. 06-1015)(amici brief of the States of California, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington,

Wisconsin and Wyoming).[1] The State of Florida now joins these thirty-two states. It undermines comity for Congress to enact a statute of limitations for habeas review of state convictions and then have the federal courts undo that statute of limitations by finding equitable tolling on such a trivial basis as stress.

As can be seen from the number of circuits that have addressed the issue and the significant split among them, this issue has percolated enough.

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[1] There were procedural hurdles in the petition in *Kephart* that are not present in this case. The amici brief of the States in *Kephart* took the broader position that equitable tolling should never be applied to the AEDPA statute of limitations. The argument in the States' amici brief was not based on, nor limited to, 28 U.S.C. § 2254(i). However, that broader argument was not made below in the district court in *Kephart*. It was being presented for the first time in this Court. The argument presented in this petition, regarding the statutory language of § 2254(i) precluding equitable tolling, was made repeatedly in the district court. The argument presented in this petition, unlike the argument presented in the petition in *Kephart*, is preserved.

Moreover, the petition in *Kephart* sought review of a case where the actual holding was merely a remand to conduct an evidentiary hearing. *Roy v. Lampert*, 465 F.3d 964, 975 (9th Cir. 2006)(remanding to the district court for an evidentiary hearing on equitable tolling). Here, in contrast, the district court conducted an evidentiary hearing and found equitable tolling to be warranted following that evidentiary hearing. This case involves an actual finding of equitable tolling unlike the case of *Kephart*. Petitioners rely on the State's amici brief in *Kephart* only as support for the argument that the States are harmed by decisions undermining the habeas statute of limitations and they encourage this Court to review such decisions.

This Court will certainly have the benefit of several points of view regarding the issue including the en banc view of the Fourth Circuit and those of Judge Easterbrook. Additionally, the conflict is not resolving itself; rather, the conflict is growing wider. This Court should grant review of this important issue.

Conflict among the Circuits

There is a significant conflict among the Circuit Courts of Appeals regarding the issue of whether equitable tolling may be based on attorney conduct. *See* Sup. Ct. R. 10 (explaining that a conflict among the circuits or with a state court of last resort may be a basis for granting certiorari review). Indeed, there is a three way split. Six circuit courts have addressed the issue and they have taken three different positions.

One circuit, the Third Circuit, has taken the position that equitable tolling based on attorney error is allowed in less than "extraordinary" circumstances, which are normally required to trigger equitable tolling, when the case is a capital case because "death is different." *Fahy v. Horn*, 240 F.3d 239, 244-245 (3d Cir. 2001); See also *Banks v. Horn*, 271 F.3d 527, 534-35 (3d Cir. 2001). The Third Circuit's position means that in any capital case where the attorney misses the deadline equitable tolling will be warranted merely because it is a capital case. This position, of course, is in direct contravention of this Court's repeated observation that the entire point of the habeas

statute of limitation was to end delays in capital cases. *Baze v. Rees*, - U.S. -, 128 S.Ct. 1520, 1542 (2008)(noting that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was designed to address the problem of "seemingly endless proceedings that have characterized capital litigation . . ." citing H.R.Rep. No. 104-23, p. 8 (1995) (stating that AEDPA was "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases")); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (stating: "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases . . ."). Obviously, it is nonsensical to hold that a statute of limitations that was designed mainly for capital cases, does not apply to capital cases. The Ninth Circuit, in a footnote, has agreed with the Third Circuit's conclusion that equitable tolling is always warranted when the attorney misses the deadline for filing the federal habeas petition in a capital case. *Spitsyn v. Moore*, 345 F.3d 796, 800, n.1 (9th Cir. 2003)(citing *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998)).

Two Circuits have taken a position diametrically opposed to the Third Circuit's position. The Fourth Circuit, in an en banc decision, and the Seventh Circuit, relying on the language of 28 U.S.C. § 2254(i) and this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), have concluded that equitable tolling may not be based on attorney conduct. See *Rouse v. Lee*,

339 F.3d 238, 249 (4th Cir. 2003)(en banc)(noting "[a]s further support for the proposition that attorney error is not an extraordinary circumstance," warranting equitable tolling "attorney error during habeas proceedings is not itself a ground for relief in a § 2254 proceeding" quoting 28 U.S.C. § 2254(i)); *Johnson v. McBride*, 381 F.3d 587, 590 (7th Cir. 2004)(citing 28 U.S.C. § 2254(i) and this Court's decision in *Coleman* to conclude that attorney conduct is not a proper basis for equitable tolling in a capital case).

The Seventh Circuit, applying agency principles, as this Court did in *Coleman*, noted that an attorney's actions are attributable to the client in the context of postconviction proceedings and therefore, the severity of attorney misconduct in habeas proceedings is irrelevant for purposes of equitable tolling. See *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005)(stating: "attorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client ...."). The Seventh Circuit has concluded that no level of attorney misconduct warrants equitable tolling. The Seventh Circuit has specifically rejected the argument that death is different when dealing with the issue of equitable tolling in capital cases because the principle that lawyers are agents for their clients applies to both capital and non-capital cases. *Johnson*, 381 F.3d at 590. The Seventh Circuit expressed its disagreement with the Third Circuit's decision in *Fahy*, noting that the *Fahy* decision was "hard to reconcile with *Coleman*, which the third circuit did not mention." *Johnson*,

381 F.3d at 590. The Seventh Circuit expressly agreed with the Fourth Circuit's en banc decision in *Rouse v. Lee*, 339 F.3d 238, 251 (4th Cir. 2003), noting that *Rouse* was also a capital case. *Johnson*, 381 F.3d at 590.

The remaining three circuits take the position attorney misconduct may form the basis for equitable tolling if the attorney's conduct is "serious attorney misconduct," "egregious misconduct" or "malfeasance." One of those circuits, the Ninth Circuit, has directly held that such conduct warrants equitable tolling. *Spitsyn v. Moore*, 345 F.3d 796, 801-02 (9th Cir. 2003)(finding equitable tolling based on ineffective assistance of postconviction counsel). In *Spitsyn*, the attorney failed to file a federal habeas petition after being instructed to do so. *Spitsyn*, 345 F.3d at 801-802. But failing to timely file a petition or complaint is just garden variety ineffectiveness. Two more circuits, the Tenth and the Eleventh Circuits, have remanded for an evidentiary hearing on equitable tolling based on allegations of egregious attorney misconduct. *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007)(remanding for an evidentiary hearing, in a non-capital case, based on allegations that the attorney's conduct was sufficiently egregious to warrant equitable tolling); *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008)(remanding for an evidentiary hearing, in a capital case, based on allegations that the attorney's conduct was sufficiently egregious to warrant equitable tolling in a capital case). In *Fleming*, the attorney repeatedly told his client that the petition was

being prepared and would be filed shortly but the attorney did not file it. But telling a client that you are working on it and will file it and then failing to do so is once again merely prototypical ineffectiveness.

The conflict is both wide and deep. The majority of circuits have addressed the issue of whether attorney conduct may be a basis for equitable tolling and there is little agreement among those circuits. *Downs v. McNeil*, 520 F.3d 1311, 1318-1322 (11th Cir. 2008)(surveying the various circuit's positions regarding whether attorney misconduct going beyond mere negligence may ever constitute an extraordinary circumstance warranting equitable tolling).[2] This Court should

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[2] Petitioners do not agree with the Eleventh Circuit's description in *Downs* of the positions that the various circuit have taken. The *Downs* opinion leaves the impression that all of the circuit courts, with the exception of the Seventh Circuit, agree on the issue. This is not accurate. The *Downs* Court, for example, omits any discussion of the Third Circuit's position relegating the *Fahy* case to a "but see" signal in a footnote. *Downs*, 520 F.3d at 1323, n.8. The Eleventh Circuit also relegates the Fourth Circuit's *Rouse* case to one sentence in a footnote and improperly characterizes its discussion of agency theory as dicta. *Downs*, 520 F.3d at 1319, n.5. Agency principles from this Court's opinion in *Coleman* were a critical part of the Fourth Circuit's reasoning in *Rouse*. The Fourth Circuit went en banc to reverse a prior panel decision finding the district court's refusal to equitably toll the statute of limitations based on habeas counsel's "incompetence" to be "unconscionable" where the panel had stated that the presence of a death sentence affects the equitable tolling analysis because death is different. *Rouse v. Lee*, 314 F.3d 698 (4th Cir. 2003). It was this panel's holding regarding equitable tolling that was before the en banc court.

grant review of this issue to resolve this deep and wide conflict among the circuit courts.

Conflict with this Court's equitable tolling precedent

Moreover, assuming that equitable tolling applies at all to the habeas statute of limitations,[3]

Petitioners cite the *Downs* case as a example of the depth of the conflict in this area. Circuit courts cannot even agree on what positions their sister circuit courts have taken.

[3] This Court has not addressed the issue of whether the AEDPA statute of limitations may be equitably tolled. *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)(assuming, without deciding that equitable tolling applies to the AEDPA because the parties did so); *Pace v. DiGuglielmo*, 544 U.S. 408, 418, n. 8 (2005)(noting the availability of equitable tolling is an open question that has never been addressed by the Supreme Court). Whether a statute of limitations is subject to equitable tolling is actually two separate questions. The first is whether the statute of limitations is jurisdictional. If it is, then that statute of limitations cannot be equitably tolled. The second is, even if the statute of limitations is not jurisdictional, whether the general presumption in favor of equitable tolling is rebutted by the text of the statute.

There is an argument that the AEDPA statute of limitations is jurisdictional (or more technically non-waiveable). Recently, in *John R. Sand & Gravel Co. v. United States*, · U.S. ·, 128 S.Ct. 750 (2008), this Court held that courts must *sua sponte* apply certain statutes of limitations, regardless of the parties' position, because certain statutes of limitations are designed to protect the public, not just the private interest of the parties. The habeas statute of limitations, like the statute of limitations at issue in *Sand & Gravel*, is designed, not merely to protect respondents' interest in timeliness, but "to achieve a broader system-

related goal" of reducing delays in capital cases. Indeed, it is hard to conceive of a statute of limitations with a broader system-related goal and more of a public purpose than the habeas statute of limitations. See also *Bowles v. Russell*, 551 U.S. 205 (2007)(holding that courts are prohibited from creating equitable exceptions to statutory jurisdictional requirements, such as the time for filing a notice of appeal). The habeas statute of limitations is a statute, not a rule. But see *Day v. McDonough*, 547 U.S. 198, 205 (2006)(stating that "[a] statute of limitations defense, the State acknowledges, is not "jurisdictional"). The majority of circuit courts, that have addressed the issue of whether the habeas statute of limitations is jurisdictional, have concluded it is not. *Diaz v. Kelly*, 515 F.3d 149, 153 (2nd Cir. 2008)(reaffirming prior decision that the AEDPA statute of limitations is not jurisdictional in light of *Bowles* and *John R. Sand & Gravel Co.*); Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 554 n.40 (2009)(listing circuit cases).

There is also an argument that, even if not "jurisdictional," the general presumption in favor of equitable tolling established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), does not apply at all to the federal habeas. The general presumption in favor of equitable tolling can be rebutted by evidence that Congress would not want the general presumption to apply. *United States v. Beggerly*, 524 U.S. 38 (1998)(refusing to apply the general presumption in favor of equitable tolling to the Quiet Title Act in light of the "special importance" of repose in the area of real property rights). There is an even greater importance to finality in the area of state criminal convictions. There is an argument that the general presumption does not apply because federal habeas litigation is "so peculiarly governmental" that there is no basis for general presumption. *United States v. Brockamp*, 519 U.S. 347 (1997)(explaining for *Irwin*'s general presumption to apply, the underlying cause of action must be "sufficiently similar" to a traditional cause of action between private parties). Habeas corpus is not similar to a traditional cause of action between private parties. It is a unique cause

there is conflict between these circuits' decisions and this Court's traditional jurisprudence regarding equitable tolling. This Court has

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of action resulting in the overturning of a criminal conviction. Habeas corpus is actually federal appellate review of a state criminal case. Moreover, the injury to be redressed is not of a type familiar to private litigation. *Chung v. U.S. Department of Justice*, 333 F.3d 273 (D.C.Cir. 2003)(holding that the general presumption in favor of equitable tolling applied to the Privacy Act, § 552a(g)(5), because sufficiently similar to a traditional tort claim for invasion of privacy). A habeas petitioner seeks release from prison, not monetary damages. Moreover, the text of the habeas statute of limitations contains provisions that both restart the federal clock and provisions that toll the clock. The presumption is rebutted when the statute contains detailed, technical language. *United States v. Brockamp*, 519 U.S. 347 (1997). The language of the federal habeas statute of limitations is much like the language of § 6511 at issue in *Brockamp* which this Court characterized as "unusually emphatic" and setting forth its limitations in "a highly detailed technical manner." The Seventh Circuit has noted that where there are detailed tolling provisions in the statute of limitation, there is no room for applying equitable tolling. *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999). The presumption can certainly be viewed as rebutted in the context of federal habeas corpus statute of limitations.

Both of these questions, however, are broader than the narrower question presented by this petition which is, even if non-jurisdictional and the general presumption applies, is the presumption rebutted in the particular area of attorney conduct based on the text of another provision of the AEDPA which prohibits relief based on attorney conduct. This case only presents the narrower question of whether equitable tolling may be found on the particular ground of attorney conduct where a specific provision of the statute, namely § 2254(i), prohibits relief on that particular basis.

adopted a general presumption in favor of equitable tolling for statutes of limitations but has held that general presumption can be rebutted by the text of the statute. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990)(creating a general but rebuttable presumption in favor of equitable tolling); *United States v. Brockamp*, 519 U.S. 347 (1997)(finding the general presumption rebutted by the emphatic and detailed language of the tax provision at issue which indicated "that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote."); *United States v. Beggerly*, 524 U.S. 38, 48 (1998)(noting that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute" and finding the general presumption rebutted by the "unusually generous" twelve year statute of limitations of the Quiet Title Act); *Young v. United States*, 535 U.S. 43, 49 (2002)(applying the general presumption in favor of equitable tolling to a three lookback provision of the Bankruptcy Code and observing that it is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute); *John R. Sand & Gravel Co. v. United States*, · U.S. -, 128 S.Ct. 750, 756 (2008) (explaining that *Irwin* adopted a rebuttable presumption of equitable tolling, not a conclusive presumption and "[s]pecific statutory language, for example, could rebut the presumption by demonstrating Congress' intent to the contrary."). These circuit decisions finding egregious attorney

misconduct warrants equitable tolling, do not cite or discuss this Court's caselaw regarding equitable tolling. Most of these circuits do not employ this Court's traditional analysis to resolve the issue of whether the habeas statute allows for equitable tolling on the basis of attorney conduct where there is a explicit provision of the habeas statute prohibiting relief based on attorney conduct. These decisions do not follow this Court's caselaw. This Court should grant review of this issue to bring these circuit cases in line with this Court's traditional equitable tolling caselaw.

Conflict with the text of the habeas statute

The federal habeas statute, 28 U.S.C. § 2254(i), provides: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." Applying this Court's traditional equitable tolling jurisprudence to this provision of the AEDPA, equitable tolling may not be based on attorney conduct. This provision of the habeas statute rebuts any general presumption in favor of equitable tolling in the area of attorney conduct. Equitable tolling may not be based on counsel's conduct because the habeas statute, itself, forbids it. The language of 28 U.S.C. § 2254(i) demonstrates Congress' intent that the habeas statute of limitations not be equitably tolling based on attorney misconduct. This section of the habeas statute precludes equitable tolling based on a

collateral attorney's incompetence, whether labeled "serious attorney misconduct," "egregious misconduct" or as in this case, attorney "malfeasance." Equitable tolling, even if applicable in other circumstances, simply may not be based on collateral counsel's conduct.

Relief means any relief including equitable tolling. *Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005)(concluding that § 2254(i) precluded granting a 60(b) motion based on habeas counsel failure to pursue discovery because the statute bars "relief," not simply particular kinds of relief, such as a granting writ of habeas corpus and noting that section 2254 "is expansive in its prohibition."). This specific statutory language precludes any relief, including equitable tolling, based on attorney conduct. The circuit cases concluding that "egregious" attorney conduct warrants equitable tolling, and the district court's finding in this case of attorney malfeasance warranting equitable tolling, conflict with the text of the habeas statute.

Conflict with this Court's *Coleman* decision

The circuits that take the position attorney misconduct may form the basis for equitable tolling if it is a capital case or if the attorney's conduct is "egregious misconduct" are in conflict with this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991). As Judge Easterbrook observed of the Third Circuit's position in *Fahy* that equitable tolling is always warranted in the face of ineffective assistance of postconviction counsel for missing the

federal deadline in a capital case, *Fahy* is "hard to reconcile with *Coleman*, which the third circuit did not mention." *Johnson*, 381 F.3d at 590. Judge Easterbrook is being delicate for once - totally ignores this Court's precedent is a more apt description of the Third Circuit's position. The majority of circuit courts that take the position that "egregious" misconduct by counsel warrants equitable tolling also ignore this Court's *Coleman* decision.

The oddest position taken is the Eleventh Circuit's position in *Downs* which discusses this Court's decision in *Coleman* and its reasoning based on agency principles at some length and then turns *Coleman* and its agency principles on their head. *Downs*, 520 F.3d at 1319-1321. The *Downs* panel distinguished *Coleman* because it "arose in a different procedural posture and implicated federalism concerns not at issue in this case." But the basic reasoning of this Court in *Coleman* did not depend on that case's procedurally posture. The basic point of *Coleman* was that because there is no constitutional right to postconviction counsel, even if postconviction counsel is ineffective, the claims will still be barred from federal habeas review. This Court has also employed this same point, citing *Coleman*, in the context of the AEDPA statute of limitations and equitable tolling in *Lawrence v. Florida*, 549 U.S. 327, 336-337 (2007)(stating: [a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel

citing *Coleman v. Thompson*, 501 U.S. 722, 756-757 (1991)). This Court's decision in *Lawrence,* while cited earlier in the *Downs'* opinion, was not discussed or distinguished by the *Downs* panel.

Indeed, the conflict with this Court's decision in *Coleman* involves even more circuits courts. Three additional circuits, the Second, the Fifth and the Eighth Circuits, take positions that are in conflict with *Coleman*. *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003)(finding equitable tolling); *United States v. Wynn*, 292 F.3d 226 (5th Cir. 2002)(remanding for evidentiary hearing) *United States v. Martin*, 408 F.3d 1089, 1090-1096 (8th Cir. 2005)(finding equitable tolling where the attorney disregarded the client's instructions to file the petition; repeatedly but inaccurately informed the petitioner and his wife about the filing deadline and the status of the case; and failed to communicate with the petitioner or his family). While these cases are all § 2255 cases, and therefore, do not directly conflict with § 2254(i); they do conflict with this Court's decision in *Coleman*.

The Second Circuit in *Baldayaque v. United States*, 338 F.3d 145, 152-153 (2d Cir. 2003), held "that an attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling to the one-year limitations period of AEDPA and equitably tolled an untimely petition. In *Baldayaque*, the attorney ignored his client's request to file the petition, failed to conduct any legal research; incorrectly advised the

petitioner's wife that the filing period had expired, and failed to meet or speak with the client at any point during the representation. *Baldayaque* 388 F.3d at 152. But all that is just prototypical ineffectiveness.

Baldayaque is a good illustration of the misuse by courts of the label "malfeasance" on facts that are nothing more than simply, garden variety attorney errors. The "malfeasance" in *Baldayaque* was that the client directed the attorney to file the habeas petition and the attorney did not do so on time and therefore, the attorney breached a basic duty to his client. *Baldayaque*, 338 F.3d at 152. The Eleventh Circuit has also employed this type of breach of duty reasoning to find one prong of equitable tolling present in a § 2254 case. *Powe v. Culliver*, 205 Fed.Appx. 729 2006 WL 3253960 (11th Cir. 2006)(unpublished), *cert. denied*, 127 S.Ct. 1496, 167 L.Ed.2d 237 (2007)(concluding that the attorney conduct in not providing trial transcript went "beyond simple mistakes into the realm of misconduct" that "may have been so far outside the range of acceptable professional conduct to be considered 'extraordinary'" and was a violation of "two fundamental tenets of professional responsibility" but not finding equitable tolling warranted because of lack of due diligence). This position, of course, means any time an attorney fails to file the petition on time, there is a breach of duty which amounts to "malfeasance" and therefore, equitable tolling is warranted. Basically, in these cases, the attorney assured his client that he would timely file a habeas petition and then

failed to do so. While these courts often characterize such conducting as lying, telling a client that you will file the petition and then missing the deadline, is just missing a deadline, not "lying." These circuits find "egregious" misconduct based on little more than missing the deadline. There was no actual "egregious misconduct" in any of these cases, there was just garden variety ineffectiveness of counsel. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990) ("[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect."); *Wallace v. Kato*, 549 U.S. 384, 396 (2007)(observing that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.").

The conflict with *Coleman* and *Lawrence* reaches to nine circuit courts. This Court should reaffirm its prior holding in *Coleman* and *Lawrence* and explain that these cases also apply to "egregious" ineffectiveness of collateral counsel.

The district court's decision

The district court gave three main reasons for equitably tolling the petition, all of which conflict with this Court's precedent. First, the district court found equitable tolling, in part, based on habeas counsel's misunderstanding of the application of *Carey v. Saffold*, 536 U.S. 214 (2002) to Florida. This reasoning conflicts with this Court's decision in *Lawrence v. Florida*, 549 U.S.

327, 337 (2007) which concluded that an attorney's misunderstanding of the law was "simply not sufficient to warrant equitable tolling."

Second, the district court found divided loyalties based on Ms. Bonner's not obtaining Asay's personal consent to intentionally missing the deadline. This reasoning conflicts with this Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004)(conceding guilt of a capital crime is not a personal right of the defendant and the attorney is not require to obtain the consent of his client to engage in this strategy). Furthermore, the district court's characterization of the attorney's conduct as "divided loyalty" violates the strictures of *Mickens v. Taylor*, 535 U.S. 162 (2002), which limited conflict of interest to multiple representation situations and of *Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986) which rejected a "divided loyalties" rationale. An attorney disagreeing with the client regarding litigation tactics and refusing to follow the client's instructions is not divided loyalties or bad faith. Rather, it is a disagreement.

Third, the district court found habeas counsel's stress from her husband's chronic illness and a vague injury warranted equitable tolling. The district court's order conflicts with this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The *Pace* Court noted that a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. Stress from a family member's illness is not an

extraordinary circumstance.

Asay did not meet his burden as required by *Pace*. An injury of unknown origin and unknown duration does not satisfy this burden. Ms. Bonner did not testify as to the cause, the nature or the extent of the injury. She did not testify as to medical treatment that the injury required or even if any medical treatment was necessary. No medical or hospital records were introduced to corroborate this vague testimony. Ms. Bonner did not testify as to the date of the injury. No causal connection between the injury and missing the deadline was established. The petition was six months late. Ms. Bonner did not testify that she was incapacitated during all or any of this six month period or even if the injury occurred around the time the petition was due. Indeed, Asay did not even call his habeas counsel, Ms. Bonner, to testify at the evidentiary hearing on equitable tolling. Rather, it was petitioners who called habeas counsel to testify at the evidentiary hearing.[4] Even if equitable tolling could be based on an attorney's incapacitation, this vague testimony would not be sufficient.

The State's position was that habeas counsel missed the deadline intentionally. Habeas counsel,

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[4] Petitioners called Ms. Bonner solely to establish that she had not lied to Asay about the habeas petition being filed. The existing Eleventh Circuit precedent of *Downs* was that equitable tolling would be warranted if counsel affirmatively misrepresented the date of the filing of a pleading.

Mary Catherine Bonner, missed the deadline in both this case and the related case of *Thomas v. McDonough,* 452 F.Supp.2d 1203 (M.D.Fla. 2006)(Petitioners are also seeking certiorari review in *Thomas*). Ms. Bonner was also the attorney in *Lawrence v. Florida*, 549 U.S. 327 (2007), where she also filed an untimely habeas petition for the purpose of litigating the statute of limitations calculations and equitable tolling. Ms. Bonner openly admitted at the evidentiary hearing that she expected the federal court to equitably toll this untimely petition.

Normally, missing the deadline to file an action would not be a wise litigation tactic, but it certainly could be in the federal habeas context. The chances of success on the merits in federal habeas are low because habeas relief is an "extraordinary remedy" limited to correcting those "grievously wronged." *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993). So, because relief on the merits is unlikely, litigating equitable tolling could be more fruitful in terms of delay and be a reasonable tactic. Delay is the name of the game in capital cases and Ms. Bonner's actions in missing the deadline have resulted in a delay of several years in this case. *Burris v. Parke*, 95 F.3d 465, 471, n.1 (7th Cir. 1996)(Manion, J., concurring)(observing that "delay is the name of the game in death penalty cases" and speculating that the criminal law professor who bifurcated the writ, risking the second habeas petition being viewed as an abuse of the writ, perhaps "was more astute than the court gives him credit for" because

"had the professor done it right the first time, this process would have been over months ago."). Ms. Bonner has delayed this case for years by missing the deadline and, even if this Court views intentionally missing the deadline as an unreasonable litigation strategy, all that amounts to is ineffectiveness of habeas counsel, which may not be a basis for relief under § 2254(i).

The district court gave "some credence" to the State's position that Ms. Bonner purposefully missed the deadline. A district court may not find that habeas counsel missed the deadline intentionally as part of a litigation tactic and then grant equitable tolling. Obviously, intentionally missing the deadline negates the due diligence prong of this Court's equitable tolling test. The district court finding of equitable tolling conflicts with this Court's *Pace* decision.

Abuse of discretion

The Eleventh Circuit abused its discretion in refusing to grant the petition for permission to file an interlocutory appeal. The district court had certified the question as being a controlling question of law as to which there is substantial ground for difference of opinion, as required by 28 U.S.C. § 1292(b). This Court has held that circuit courts abuse their discretion when they act in an manner that is inconsistent with the policies embodied in AEDPA. *Gonzalez v. Crosby*, 545 U.S. 524, 533 (2005)(discussing the prior holding of *Calderon v. Thompson*, 523 U.S. 538 (1998) where

this Court found a circuit court abused its discretion by *sua sponte* recalling the mandate in a capital federal habeas case because such actions were inconsistent with the policies embodied in AEDPA.); *Bell v. Thompson*, 545 U.S. 794 (2005)(finding a circuit court abused its discretion by delaying the issuance of its mandate in a capital federal habeas case). The Eleventh Circuit abused its discretion because its refusal to hear the interlocutory appeal undermines one of the key provisions of the AEDPA - the statute of limitations.

Unless this Court grants review, there will never be appellate review of the district court's finding of equitable tolling because the petition for an interlocutory appeal was denied. Given the stringent standards for granting relief under the AEDPA, the chances are that Asay's habeas petition will denied. While the order granting equitable tolling will become final once the petition is denied, the Eleventh Circuit will probably then view the issue regarding the finding of equitable tolling as moot on appeal. If the habeas petition is denied on the merits, as it is highly likely to be, the Eleventh Circuit is unlikely to be willing to entertain any cross appeal of the order finding equitable tolling. This means the State will never get appellate review of the order finding equitable tolling because the Eleventh Circuit refused to permit an interlocutory appeal. The effect of the Eleventh Circuit's denial of an interlocutory appeal is to render the finding of equitable tolling unreviewable unless this Court grant certiorari

review.

The State of Florida's main concern is not the burden and expense of having to answer an untimely federal habeas petition - that is the least of the State's concerns. *Cf. Will v. Hallock*, 546 U.S. 345 (2006)(holding that it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether a district court order is "effectively unreviewable" under the collateral order doctrine). The State's main concerns are the precedential value of the district court's order and the delay answering the petition will cause.

The State is concerned regarding the precedential value of the district court's order finding equitable tolling due to habeas counsel's stress. This order will be used as persuasive authority by the capital defense bar to establish equitable tolling whenever state postconviction counsel or habeas counsel is under stress from a family member's illness. Indeed, the district court's prior published opinion refusing to apply equitable tolling, which was later withdrawn, was cited by the capital defense bar because of its sympathetic language. *Thomas v. McDonough,* 452 F.Supp.2d 1203. n.1 (M.D.Fla. 2006)(stating: "I would be remiss if I did not share my deep concern that in these cases our federal system of justice fell short in the very situation where the stakes could not be higher" and observing that "Asay is arguably the most egregious of this trilogy because, there, the Petitioner Asay actually was aware of the federal limitations deadline and implored his attorney to

file the petition timely, all to no avail."). This unreviewed order will be used as precedent in other capital cases further undermining the AEDPA's statute of limitations.

The Eleventh Circuit's refusal to permit an interlocutory appeal will significantly delay this capital case. The murders in this case occurred in 1987. Delays, while unfortunate in any type of litigation, create unique harms in capital cases. Delays in capital cases create an independent constitutional claim based on the delay itself. *Thompson v. McNeil,* 129 S.Ct. 1299 (2009)(Stevens, J., respecting denial of certiorari)(expressing the views of Justices Stevens and Breyer that "substantially delayed executions arguably violate the Eighth Amendment's prohibition against cruel and unusual punishment" citing *Lackey v. Texas*, 514 U.S. 1045 (1995)(Stevens, J. respecting denial of certiorari); *Smith v. Arizona*, 552 U.S. -, -, 128 S.Ct. 2997 (2007)(Breyer, J., dissenting from denial of certiorari)(expressing the view that a thirty year delay is both unusual and cruel). Delays create *Lackey* claims.

Most importantly, delays in capital cases increase the murder rate. According to recent studies, delays in executions undermine the deterrence rationale of capital punishment, thereby literally increasing the number of murders.[5] This

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[5] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 748-750 (2005)(taking the

is not true of any other type of case.

Granting equitable tolling can literally create a decade worth of litigation where Congress intended that there be no litigation. The figure of a decade is not an exaggeration as the case of *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001), illustrates. In *Fahy*, the Third Circuit allowed an untimely federal habeas petition to be equitably tolling based

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position that because death penalty is a significant deterrent to murder, as recent studies establish, including one leading study finding that each execution deters some eighteen murders, the state is morally obliged to use it as a form of punishment and a serious commitment to the sanctity of human life compels it as a form of punishment); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 Mich. L. Rev. 203 (2005)(stating, in the introduction, that recent empirical studies by economists have shown, without exception, that capital punishment deters crime but noting that a threshold number of executions must occur for the deterrence effect to exist); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453, 474 (2003)(using panel data on all death sentences handed out in the United States between 1977 and 1997 and finding that "[e]ach additional execution decreases homicides by about five, and each additional commutation increases homicides by the same amount, while one additional removal from death row generates one additional homicide"); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003)(finding that the murder rate is significantly reduced by both death sentences and executions and explaining that the most striking finding was that on average, each execution results in eighteen fewer murders).

on attorney error because it was a death penalty case. The habeas petition in *Fahy* was filed on October 13, 1999. See *Fahy v. Horn*, 2:99-cv-05086-NS (E.D. Penn.). A warrant had been signed before the federal petition was filed. *Fahy*, 240 F.3d at 242. There was a first appeal. *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001). Then, there was a second appeal. *Fahy v. Horn*, 516 F.3d 169, 179 (3d Cir. 2008). In the second appeal, the Third Circuit remanded the case for further proceedings. As of July, 2009, the petition in *Fahy* is still pending in the district court. No doubt, there will be a third appeal. *Fahy*, 516 F.3d at 175 (noting "[t]wenty-seven years after the murder of twelve-year-old Nicoletta Caserta, the case of Henry Fahy returns to this Court, and possibly not for the last time."). The end of the habeas litigation of an admittedly untimely habeas petition is not even in sight in the *Fahy* case and the finding of equitable tolling based on attorney error has caused at least a ten year delay in the execution. *Fahy* is exactly the type of case that prompted Congress to enact the AEDPA statute of limitations in the first place.

In this case, Asay filed his untimely petition on August 15, 2005. Respondents filed a limited response asserting that the petition was untimely and the case should be dismissed on September 2, 2005. The district court conducted two oral arguments; ordered several rounds of supplemental briefing and conducted an evidentiary hearing on the timeliness and equitable tolling issue. This case has been pending for over four years on the sole issue of timeliness. It is time to end this case.

Moreover, it is an abuse of discretion to refuse to hear an interlocutory appeal when the Circuit's own precedent establishes that there is a "substantial ground for difference of opinion" as required by the interlocutory appeal statute, 28 U.S.C. § 1292(b). The Eleventh Circuit in *Downs v. McNeil*, 520 F.3d 1311, 1319 (11th Cir. 2008), noted the split among "[s]even of our fellow circuits" regarding equitable tolling. Indeed, there is an intracircuit conflict in the Eleventh Circuit regarding certain aspects of when equitable tolling is warranted. Compare *Downs v. McNeil*, 520 F.3d 1311, 1322 (11th Cir. 2008) (concluding equitable tolling would be warranted based, in part, on Downs' "unequivocal, repeated demands that his attorneys file his habeas petition") with *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008)(concluding equitable tolling was not warranted when counsel failed to file a federal habeas petition timely despite repeated instructions to do so). The Eleventh Circuit's own precedent firmly establishes that there is a substantial difference of opinion upon which neither the judges of other circuits nor the judges of the Eleventh Circuit itself can agree. The Eleventh Circuit abused its discretion by refusing to hear the interlocutory appeal. This Court should grant review of this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

BILL McCOLLUM
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Deputy Attorney General
Counsel of Record

CHARMAINE MILLSAPS
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY
GENERAL
CAPITAL APPEALS
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER A. MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET. AL.
Petitioner,

v.

MARK JAMES ASAY
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

BILL McCOLLUM
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Assistant Deputy Attorney General

CHARMAINE M. MILLSAPS
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)

*Counsel of Record

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WILLIAM GREG THOMAS,
Petitioner,

v. CASE NO. 3:03-cv-237-J-32

WALTER A. MCNEIL, et al.,
Respondents.

MARK JAMES ASAY,
Petitioner,

v. CASE NO. 3:05-cv-147-J-32

WALTER A. MCNEIL,
Respondent.

ORDER[1]

These are two of a trilogy of capital habeas cases which have raised difficult issues of whether the Petitioners' habeas petitions were timely filed. In

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[1] Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it has been entered only to decide the motion or matter addressed herein and is not intended for official publication or to serve as precedent.

Thomas v. McDonough, 452 F.Supp.2d 1203 (M.D. Fla. 2006), the Court ruled that two of the three cases were untimely. However, the Court later granted rehearing and held an evidentiary hearing on all three cases regarding the issue of equitable tolling. The Court then received guidance from the Eleventh Circuit, which decided Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008) and Holland v. Florida, 539 F.3d 1334 (11th Cir. 2008) (per curiam). Based on Downs and Holland, the Court has now decided one of the trilogy, Damren v. McNeil, No. 3:03-cv-397-J-32, 2009 WL 129612 (M.D. Fla. Jan. 20, 2009), determining that petitioner Damren's habeas petition must be dismissed as untimely notwithstanding the gross negligence of his appointed lawyer in failing to file the petition on time.

The Court now turns to the remaining two cases,

involving Petitioners Thomas and Asay,[2] and chooses to address them in one consolidated opinion pursuant to Rule 42(a), Federal Rules of Civil Procedure, because they each raise the same issue of equitable tolling based on the actions of the same attorney who represented both Petitioners.[3]

TIMELINESS (THOMAS)

Before addressing any issue of equitable tolling, the Court must first determine whether the habeas petitions were untimely under the one year limitation period contained in 28 U.S.C. § 2244(d). In its original opinion in Petitioner Thomas' case, 452 F.Supp.2d at

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[2] The Court will refer to the document number in the particular case being addressed.

[3] Petitioners' current counsel in all three of these cases is John Mills, Esquire. Mr. Mills had nothing to do with the original and untimely filing of these petitions, but rather was appointed by the Court to represent the Petitioners once the Court realized that the actions of predecessor counsel were being called into serious question. The Court appreciates Mr. Mills' service in these cases.

1211-13, the Court calculated that Petitioner's federal petition was due to be filed by April 16, 2003. However, after further investigation, both the state and Thomas agreed that the correct date is actually June 18, 2003[4] (Doc. #103 at 6); (Doc. #104 at 9). Thomas' habeas petition was not filed until March 22, 2004; thus, it was untimely under the statute. In the Court's previous opinion, 452 F.Supp.2d at 1212-18, the Court rejected a variety of arguments as to why this untimeliness should be excused. The Court hereby reaffirms those rulings. However, the Court was concerned whether the actions of Petitioner's federal habeas counsel in filing the petition late might constitute a basis for equitable tolling. The Court therefore conducted several hearings, appointed additional counsel, granted rehearing, and

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[4] The parties became aware of a Ring v. Arizona, 536 U.S. 584 (2002) motion filed in state court, not previously mentioned or presented to the Court in supporting documents.

conducted an evidentiary hearing. The Court will address that issue in this opinion.

TIMELINESS (ASAY)

Unlike Petitioner Thomas, the Court has not previously addressed in detail the procedural history of Asay's case to determine whether his federal habeas petition was timely. Here is that history:

Petitioner was convicted of first degree murder and sentenced to death. On direct appeal, the Supreme Court of Florida affirmed the convictions and sentences.[5] Asay v. State, 580 So.2d 610 (Fla.), cert. denied, 502 U.S. 895 (1991); Ex. A.[6] Petitioner's

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[5] The facts underlying the judgment and sentences, as summarized by the Florida Supreme Court, are provided in the May 16, 1991 decision.

[6] The Exhibits were filed on September 2, 2005, as Respondent's Exhibits to Motion for Summary Judgment (Doc. #14). The Court will hereinafter refer to Respondent's Exhibits as "Ex." Additionally, the Court will hereinafter refer to the exhibits submitted at the evidentiary hearing by Petitioner Asay's surname and

conviction became final on October 7, 1991, when the United States Supreme Court denied certiorari. Ex. B. Since his conviction became final prior to AEDPA's effective date, the one-year limitation period began to run on April 24, 1996. See Guenther v. Holt, 173 F.3d 1328, 1331 (11th Cir. 1999), cert. denied, 528 U.S. 1085 (2000). Thus, Petitioner should have filed this action on or before April 24, 1997, unless any periods of time can be excluded from this one-year grace period because Petitioner was pursuing a properly filed application for state post-conviction relief.

Petitioner filed his first Rule 3.850 post conviction motion on March 16, 1993.[7] Thus, the federal limitation period was tolled from April 24, 1996, to

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the tab number, *e.g.*, Asay, Tab 1, or by referencing the particular Exhibit.

[7] Petitioner states that he filed the motion on March 15, 1993. Asay, Tab 14. The Petition at 4 (Doc. #8) and the Supreme Court of Florida's Revised Opinion of June 29,

December 1, 2000, when the Florida Supreme Court issued its mandate from the affirmance of the denial of post conviction relief. Ex. D. The limitation period ran for 327 days until Petitioner filed his state petition for writ of habeas corpus on October 25, 2001. Petition (Doc. #8) at 4. The petition was denied on June 13, 2002, Ex. E, and rehearing was denied on October 4, 2002. Ex. F. The limitation period ran for twelve days, until Petitioner filed his second Rule 3.850 motion on October 17, 2002. Petition (Doc. #8) at 5. The second Rule 3.850 motion[8] tolled the limitation period until December 20, 2004, when the Supreme Court of Florida affirmed the denial of relief. Ex. H. At that point, twenty-six days remained in the one-year federal

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2000, state the motion was filed on March 16, 1993. Ex. C at 4-5.

[8] The Court will assume for purposes of this opinion that the second Rule 3.850 was properly filed. This should not serve as precedent for other proceedings.

limitation period. Therefore, Petitioner should have filed his federal petition on or before Monday, January 17, 2005.[9]

Petitioner Asay initiated this action by filing a pro se letter (Doc. #1) (hereinafter Letter) on February 8, 2005, pursuant to the mailbox rule. In the Letter, he complains that his counsel, Dale G. Westling, Esquire, and Mary C. Bonner, Esquire, are ineffective and they failed to timely file a 2254 petition. Petitioner seeks equitable tolling and other relief from the Court. Petitioner's counsel were directed to respond to the Letter.

On March 7, 2005, Mr. Westling and Ms. Bonner filed a Response to This Court's Order of February 15, 2005 (Doc. #5) (hereinafter Response), stating:

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[9] As noted by Respondent, the one-year period would have expired on January 15, 2005 (a Saturday), so Petitioner had until Monday, January 17, 2005, to file the petition.

> Mr. Asay is the victim of an overly technical system where the practicalities of review of records and appointment of federal counsel are in a state of flux. He is necessarily concerned and cautious. However, he has approximately five months' time in which to timely file his Motion to Vacate pursuant to Title 28 USC § 2254.
>
> Carey v. Saffold, 536 U.S. 214 (2002), permits Mr. Asay to file a timely Motion to Vacate if that Motion is filed within the next five months' time. Mr. Asay fears that Carey does not apply. A review will be undertaken herein to establish that the United States Supreme Court's holding is applicable in this case.

Response at 1.

Thereafter, on August 15, 2005, Ms. Bonner filed a Petition for Writ of Habeas Corpus (Doc. #8) (hereinafter Petition), an Affidavit of Indigency (Doc. #9) and a Request for Nunc Pro Tunc Appointment as Counsel; Request for Leave to Supplement Form Provided for Motion to Vacate; Motion for Leave to File

a Memorandum of Law in Support of Mr. Asay's Factual Presentation (Doc. #10). Supplementary Affidavits to Mr. Asay's Motion to Vacate Conviction and Sentence (Doc. #12) were filed on August 22, 2005.

Thus, the petition was due by January 17, 2005, and was not filed until August 15, 2005; therefore, it is untimely. Thus, unless equitable tolling applies, Petitioner's petition is due to be dismissed.

THE LAW OF EQUITABLE TOLLING

Until recently, the Eleventh Circuit's decisions were evolving regarding the circumstances in which a habeas attorney's conduct might provide the basis for equitable tolling. It has always been clear that equitable tolling will only apply in "extraordinary circumstances" and that the Eleventh Circuit "has rejected most claims for equitable tolling," especially in situations involving the negligence of the petitioner's attorney. Diaz v. Sec'y for the Dep't of Corr., 362 F.3d

698, 700-701 (11th Cir. 2004) (per curiam). However, the Eleventh Circuit had left open the door to equitable tolling claims based on egregious attorney conduct. See Powe v. Culliver, 205 Fed. Appx. 729, 731 (11th Cir. 2006) (per curiam) (not selected for publication in the Federal Reporter), cert. denied, 549 U.S. 1270 (2007). Other circuits have likewise found equitable tolling to apply in cases of serious attorney misconduct. See Fleming v. Evans, 481 F.3d 1249, 1256 (10th Cir. 2007); United States v. Martin, 408 F.3d 1089, 1093 (8th Cir. 2005); Baldayaque v. United States, 338 F.3d 145, 152 (2nd Cir. 2003); Spitsyn v. Moore, 345 F.3d 796, 801-802 (9th Cir. 2003); Brown v. Shannon, 322 F.3d 768, 773-74 (3d Cir. 2003); and United States v. Wynn, 292 F.3d 226, 230 (5th Cir. 2002).

In a recent pair of decisions, Downs and Holland, the Eleventh Circuit has now solidified the law in this

area.[10] In Downs, the Eleventh Circuit rejected the state's contention that attorney misconduct could never constitute extraordinary circumstances justifying equitable tolling, 520 F.3d at 1319-25. Recognizing a split among the circuits, the Eleventh Circuit noted that it had not previously decided the issue. Id. at 1319. The Eleventh Circuit stated that "an attorney's ordinary negligence may be attributed to the client under general principles of agency[,]" but declined to extend that principle to cases involving "egregious misconduct of postconviction counsel." Id. at 1320. It pointed to case law holding that an agent does not bind his principal "when the agent is acting adversely to the principal's interests[,]" and it chose to follow those circuits that hold that "serious attorney misconduct may constitute

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[10] Notably, the United States Supreme Court has never held that equitable tolling applies in federal habeas cases, though it has assumed *arguendo* that it does.

an extraordinary circumstance for purposes of equitable tolling." Id. at 1321. The Eleventh Circuit noted that other circuits have recognized that equitable tolling could be appropriate "where the attorney has made misrepresentations to the client, disregarded the client's instructions, refused to return documents, or abandoned the client's case." Id. The Court determined that it would apply a "fact-specific, case-by-case approach." Id. at 1322. While remanding for an evidentiary hearing, the Court concluded that petitioner's allegations of the following conduct would support equitable tolling if proven:

> "[petitioner's] unequivocal, repeated demands that his attorneys file his habeas petition; his close tracking of his attorneys' work and the applicable federal deadlines; and his counsel's overt deception in representing they had filed a tolling

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Lawrence v. Florida, 549 U.S. 327, 335-36 and n.3 (2007).

> petition in state court when they had not in fact done so[.]"

Id.

The Eleventh Circuit in Downs, also found that the petitioner had met the due diligence requirement for equitable tolling because he had written to his attorneys "to express concern over the running of the AEDPA filing period and to urge the filing of his federal habeas petition" and he had "attempted to assist his attorneys in drafting his federal petition by providing them with either a draft petition or a list of issues to be included in the petition." Id. at 1323. The Court also found that "[e]vidence of [petitioner's] lawyers' untrustworthiness surfaced slowly and counsel's communications throughout the course of representation left it unclear whether and when counsel had drafted and filed [petitioner's] state and federal habeas petitions." Id. at 1324. Moreover, the Court noted that because petitioner

was represented by counsel, any pro se petition he tried to file would be stricken under the Local Rules. Id. at 1324 and n.10. The Downs Court emphasized that while serious misconduct could justify equitable tolling, "ordinary attorney negligence[,]" such as miscalculating a deadline, failing to adequately raise a meritorious claim, or another run of the mill mistake, would not. Id. at 1325. Petitioner's case was exceptional because his counsel "allegedly lied to Downs on a matter of legal importance and evinced utter disregard for Downs' repeated directive to file his habeas petition." Id.

Finally, the Eleventh Circuit in Downs stated:

> In considering whether the conduct of counsel was extraordinary, we will not dissect the continuing course of conduct in which counsel engaged, but rather view counsel's behavior as a whole. Consequently, although the culminating event which rendered Downs' federal habeas petition untimely was counsel's late filing of the petition, that ordinary act of negligence

> cannot be isolated from counsel's allegedly egregious misconduct.

Id. at 1323.[11]

Shortly thereafter, the Eleventh Circuit decided Holland, in which it rejected a claim of equitable tolling based on attorney misconduct. The Eleventh Circuit declined to extend Downs to the facts of Holland's case stating, "[w]e are attempting to keep the exception for extraordinary circumstances from being the rule." Holland, 539 F.3d at 1339 n.10. In Holland, the Eleventh Circuit assumed petitioner Holland's lawyer was "negligent, even grossly negligent" but held that petitioner's equitable tolling claim failed because petitioner made "no allegation of knowing or reckless factual misrepresentation [by the lawyer] or of lawyer

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[11] The Eleventh Circuit also cited with approval Lonchar v. Thomas, 517 U.S. 314, 324 (1996) ("Dismissal of a *first* habeas petition is a particularly serious matter, for that dismissal denies the petitioner

dishonesty. Instead, Petitioner's allegations are limited to [the lawyer's] failure to communicate with Petitioner on the status of his case and to [the lawyer's] failure to file a federal habeas petition timely, despite repeated instructions to do so." Id. at 1339.

In affirming dismissal of the petition, the Holland Court announced the following principle of law: "no allegation of lawyer negligence or failure to meet a lawyer's standard of care · in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part · can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough." Id.

This Court was concerned enough about Petitioners' counsel conduct to conduct an evidentiary

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the protections of the Great Writ entirely, risking injury to an important interest in human liberty.") Id. at 1323.

hearing (as suggested by Downs).[12] Now, the Court will apply the facts as found to the principles set forth in Downs and Holland. See also Melson v. Allen, 548 F.3d 993 (11th Cir. 2008).[13]

EQUITABLE TOLLING AS TO THOMAS

The Thomas case first came to the Court's attention on March 24, 2003, when Petitioner Thomas, through counsel Mary Catherine Bonner, filed a "Motion for Appointment of Counsel Pursuant to 18 U.S.C. § 3001 et. seq. and 21 U.S.C. § 848 et. seq. for Representation in To-Be-Filed Federal Habeas Corpus Proceedings in a Capital Case" (Doc. 1).[14] The motion

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[12] See also Hammond v. Frazier, No. 07-10573, 2008 WL 1891478 (11th Cir. Apr. 30, 2008) (per curiam) (non-published) (remanding under Downs for the district court to conduct evidentiary hearing on equitable tolling claim based on alleged attorney misconduct).

[13] The Court is aided by supplemental briefs filed by the parties to address the facts of the case in light of Downs and Holland.

[14] Of course, the one year limitation period continues to run even if a petitioner files a motion for appointment of

states that counsel was contacted by Petitioner's state post-conviction counsel in February 2003, and due to the interaction of the time frames of the state and federal litigation, the matter was of an urgent nature. Thus, the Court immediately conducted a hearing on March 26, 2003. Ms. Bonner appeared telephonically and requested immediate pre-petition appointment so that she could timely prepare and file a habeas petition. Ms. Bonner stated her qualifications were that she was in good standing with the Court since 1979, she practiced both before the Eleventh Circuit and the United States Supreme Court, she litigated both Section 2255 and 2254 actions, and she had represented three people on death row in state capital cases. The Court, comforted that Ms. Bonner was experienced capital counsel, stated

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counsel in federal court until such time as a petition for writ of habeas corpus is actually filed. See Woodford v. Garceau, 538 U.S. 202, 208 (2003). Thus, Ms. Bonner's

that it would enter an order appointing her. That Order was filed April 2, 2003, nunc pro tunc to March 26, 2003.[15] Based on Ms. Bonner's statements of the urgent timing, the Court expected a petition to be filed almost immediately.[16] However, nothing happened. Finally, on June 4, 2003, the Court entered an order requiring Petitioner to advise the Court, no later than June 17, 2003, of the status of the case. Order (Doc. #5). Ms. Bonner filed an Ex Parte Status Report[17] on June 12, 2003 (Sealed Document S-8). In the Report, counsel

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filing of the motion for appointment of counsel did not stop the limitations period from running.

[15] At the time it was assumed by Ms. Bonner that the petition was due to be filed in April 2003. Much later, the Court determined that the petition was not actually due to be filed until June 18, 2003.

[16] As is typical, the Court was not independently knowledgeable as to the limitations deadline but was relying on Ms. Bonner's statement that time for filing a petition was short.

[17] The Court finds that the Ex Parte Status Reports mentioned are not the type of information that should remain confidential as it pertains to the timeliness

anticipated that investigation, research and drafting a petition would consume at least six more weeks. On July 21, 2003, Ms. Bonner filed another Ex Parte Status Report stating she anticipated that investigation, research and drafting a petition would consume, at least, an additional six weeks. (Sealed Document S-12). Of course, by this time (unbeknownst to the Court) the June 18, 2003 limitation deadline had come and gone.

Seven months later, On February 19, 2004, having heard nothing from Ms. Bonner, the Court ordered Petitioner to advise the Court, no later than March 15, 2004, of the status of the case or face dismissal for failure to prosecute (Doc. #7). On March 15, 2004, Ms. Bonner filed a status report and asked leave to file her habeas petition no later than March 19, 2004 (Doc. #8). The Court entered an Order (Doc. #9),

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issue. Thus, the Court will unseal these documents (S-8 and S-12) and file them in the public docket.

filed on March 18, 2004, stating that leave is not required to file a petition and that any determination as to the timeliness of the petition would be made after the filing of the petition and the response. At long last, the petition (Doc. #12) was filed on March 22, 2004. The Court ordered Respondents to file a limited response addressing the timeliness issue, which Respondents did (Doc. #15).

The Court conducted oral argument on the timeliness issue. (Doc. #38). The essence of Ms. Bonner's position was that she had no explanation for why she filed the Petition untimely other than that she felt that she needed more time to investigate Petitioner's case before she filed a petition and that she intended to rely on equitable tolling as a basis to have her petition declared timely. Notably absent from Ms. Bonner's statement was whether she advised her client of her "strategy." The Court was incredulous that a member of

the Bar could deliberately let a statute of limitations expire, hoping later to convince the Court to apply equitable tolling.

Concerned, the Court appointed new co-counsel, John Mills (who has remained Petitioner's counsel since then), to further address the timeliness issue. Ultimately, Mr. Mills persuaded the Court that before the Court made a final decision in these cases, it should conduct an evidentiary hearing. In the meantime, the Court conducted another motion hearing at which Ms. Bonner in part blamed the mental and physical health of her husband and herself as reasons for her actions. Out of respect for Ms. Bonner's privacy, the Court will not repeat what she said on the record that day, but instead incorporates pages 79-82 of the transcript of the December 17, 2007 hearing. (Doc. #63).

Both Ms. Bonner and Petitioner Thomas

testified[18] at the evidentiary hearing held February 21, 2008. While the transcript of that hearing will speak for itself (Doc. #84), the State's summary of this testimony contained in its supplemental brief is largely accurate:

> At the evidentiary hearing, Petitioner William Greg Thomas testified that his girlfriend, Ms. Sipple, sent a letter to Mary Katherine Bonner. (T. 87, 89). On January 6, 2003, Ms. Bonner sent an email back to Ms. Sipple. (T. 89). Ms. Bonner indicted [sic] that she would represent Thomas and was familiar with federal habeas. (T. 92). The email contained a discussion of the applicable time frames. (T. 93, 94). On January 21, 2003, approximately five months before Thomas' habeas petition was due on June 18, 2003, Ms. Bonner wrote him a letter. (T. 95). On January 30, 2003, Dale Westling, his state counsel, wrote Thomas a letter, saying that he was going to ask state court judge, Judge Wiggins, to appoint an attorney to handle his federal habeas. (T. 96-97). On March 3, 2003, over three months before Thomas' petition was

[18] Thomas testified by video conference.

due, Ms. Bonner wrote Thomas telling him that Dale Westling did not know when Thomas' habeas petition was due (T. 98). Ms. Bonner expressed the intention of filing a petition for certiorari in the United States Supreme Court "to buy some time" to file the federal habeas petition. (T. 98). Thomas was left with the impression that Ms. Bonner knew what she was talking about and his petition would be timely filed. (T. 99). Ms. Bonner, in a letter to Dale Westling referred to the prosecutor's agreement not to assert any time bars but noted that regardless of that agreement, many courts explore their "own jurisdiction when neither party wishes it." (T. 100). On March 10, 2003, over three months prior to Thomas' habeas petition being due in federal court, state counsel, Dale Westling wrote a letter to Thomas, saying that the [sic] he filed a motion for appointment of counsel in federal court but that the judge declined to appoint Ms. Bonner to represent him. (T. 101). On March 19, 2003, approximately three months prior to the habeas petition being due, Ms. Bonner wrote a letter to the clerk of this Court stating that the time for Mr. Thomas to timely file his federal

habeas petition was running out. (T. 103). On March 19, 2003, approximately three months prior to the habeas petition being due, Ms. Bonner also wrote a letter to Thomas explaining that the federal public defender had advised her that her motion to be appointed as habeas counsel would probably not be acted upon quickly and advising Thomas to file the federal habeas petition pro se. (T. 104). Ms. Bonner enclosed a habeas petition for Thomas and advised Thomas to copy the issues raised in his state 3.850 motion and ask for leave to amend after the appointment of counsel. (T. 105). Thomas completed the habeas and sent it back to Ms. Bonner to notarize and send to the court per her instr ctions. (T. 105-106). The handwritten date next to Thomas' signature on the habeas petition, filed as Doc #12, was April 4, 2003 which was over two months before the habeas was due. (T. 106). On March 24, 2003, approximately three months prior to the habeas petition being due, Ms. Bonner wrote a letter to Thomas saying that she received a call from prosecutor George Bateh informing her that Mr. Westling was going to continue to represent Thomas in federal court. (T. 107). On March

25, 2003, Mr. Westling wrote a letter to Thomas. (T. 107-108). On March 26, 2003, approximately three months prior to the habeas petition being due, Ms. Bonner wrote a letter to Thomas saying she was appointed today. (T. 108-109). On April 10, 2003, approximately two months prior to the habeas petition being due, Ms. Bonner wrote a letter to Thomas saying it would be better to file a petition for writ of certiorari in the Supreme Court than a habeas petition in federal district court. (T. 109- 110). She wrote that she would continue to prepare the § 2254 petition, so when the certiorari petition was denied "we will be ready to file virtually immediately." (T. 110). Thomas did not file the § 2254 petition himself because he had no reason to believe the [sic] Ms. Bonner was not handling it. (T. 110). Thomas explained that if you file a petition yourself when you are represented by counsel they reject it - you cannot file pro se. (T. 111). On April 15, 2003, approximately two months prior to the habeas petition being due, Ms. Bonner wrote a letter to Thomas stating that his time to file ran before his 3.851 motion was filed in state court "in that mess with counsel." (T. 111).

She stated that the first hurdle may be timeliness and since it is already untimely, she was going to "give it another week or so of preparation time." (T. 111). Thomas "figured" Ms. Bonner had lied to him. (T. 112). On June 4, 2003, fourteen days prior to the deadline, Ms. Bonner wrote a letter to Thomas stating that she was working. (T. 112-114). On June 21, 2003, three days after the deadline had passed, Ms. Bonner wrote a letter to Thomas stating that the State had asserted that the habeas petition was untimely. (T. 114). She also wrote in this letter that the judge granted her additional time until July 30th to develop a constitutional attack which was "incredibly good news" and she was laying the groundwork for an attack on the AEDPA's time limitation which would be a long road but "we have to do it." (T. 115). On July 28, 2003, ten days after the deadline had passed, Ms. Bonner wrote a letter to Thomas stating the dates under the AEDPA "were gone long ago" and so she made the "considered decision" to file a complete set of moving papers. (T. 115). On August 27, 2003, approximately one month after the deadline had passed, Ms. Bonner

wrote a letter to Thomas which included a § 2254 petition. (T. 116). Thomas did not know that she had not filed the petition he sent her in April of 2003. (T. 116). On cross, it became clear that, when Thomas testified that Ms. Bonner lied to him, he meant when she stated his time had run before his state 3.851 was filed. (T. 117-118). She was mistaken and "something had to be wrong." (T. 122).

. . . . .

Mary Catherine Bonner testified. (T. 139). She had no idea why she came to the conclusion that the time had run out. (T. 140). She believed that the filing of [a] petition of writ of certiorari in the Supreme Court from the state postconviction proceedings tolled the time to file a habeas petition in the district court. (T. 142). When asked why she did not file the pro se petition signed by Thomas on April 3, 2003, she testified there was no such document. (T. 142-143). According to Ms. Bonner, there was no document filled out by Thomas that was sent to her. (T. 143). It was her handwriting in the March 22, 2004 habeas that was filed. (T. 144). She had no idea why the date

of Thomas' signature was April 3, 2003 and did not know if it was accurate. (T. 144). Her files regarding the Thomas case were destroyed by Hurricane Wilma in 2005. (T. 147). Ms. Bonner adopted her prior statements at the oral argument in December 17, 2007, regarding her husband's health. (T. 149, 154). Her family issues were "very severe and very overwhelming." (T. 150). Due to the "very difficult time." [sic] she made mistakes. (T. 151). She testified that she was aware of Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000) but that there was a circuit split regarding the issue of whether a petition for writ of certiorari from state postconviction proceedings tolled the time to file. (T. 153).

The court asked Ms. Bonner as an officer of the court whether it was proper to miss a deadline simply because there was more to do on the pleading. (T. 155). She did not believe that she could have filed a skeletal motion. (T. 155). She believed that factual innocence was at issue in the case. (T. 156). The court noted that there was no claim of factual innocence in the record but she explained that she was

> exploring the issue. (T. 156). The court noted that he had appointed Ms. Bonner on an emergency basis because the time was running out. (T. 156). The court asked why she had moved for an emergency appointment and then not filed the habeas petition on time and she stated that she felt like developing certain issues based on her conversation with Thomas. (T. 156-157). She testified that she intended to rely on equitable tolling to excuse the late filing. (T. 157). Her own and her husband's health situation was the reason for the late filing. (T. 159).
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> Petitioner Thomas attempted to identify the handwriting in the content section of the habeas petition that was filed. (T. 160-161). Thomas testified that a paralegal Eric Branch filled out a habeas petition for him. (T. 161).

Supplemental Briefing Following Evidentiary Hearing (Doc. #104), filed December 24, 2008, at 9-15 (footnotes omitted).

As instructed by the Eleventh Circuit in Downs, this Court must "view counsel's behavior as a whole."

Downs, 520 F.3d at 1323. In hindsight, from the moment that Ms. Bonner filed her urgent application for appointment to be Petitioner's attorney, she has engaged in an egregious pattern of misfeasance. She has been grossly negligent to be sure, but it goes beyond that. Ms. Bonner, apparently deliberately, let the limitations period go by because she was not ready to file and felt that further investigation was required. Nevertheless, she wrote conflicting and inconsistent letters to Thomas about the deadline. She then submitted a habeas petition to Petitioner which he completed, signed and sent to her for filing on April 3, 2003, still well within the limitations deadline (Doc. #84 at 105-07, 160-62; Exhibit 11).[19]

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[19] The full copy of this petition could not be located and is not in the record. There is no dispute, however, that the petition appearing in the record as Petitioner's Exhibit 11 was signed on April 3, 2003 by Mr. Thomas, although it appears that Ms. Bonner had completed the rest of the form (Doc. #84 at 142-46, 160-62).

On April 15, 2003, Ms. Bonner wrote Mr. Thomas, incorrectly telling him that his petition was already untimely but nevertheless giving him every reason to think that the petition would be filed in "another week or so . . . ." Exhibit 13, filed February 21, 2008. Mr. Thomas testified that he believed that Ms. Bonner had done what she promised and that he did not learn until 2006 that the petition had in fact not been filed at that time. Doc. #84 at 116-17, 127.

On June 4, 2003, the Court entered the following Order (Doc. 5):

> The Court has before it a proposed litigation budget for Court approval in a CJA voucher for appointment of an authority to pay court appointed counsel. The Court, however, is reluctant to take these requests under consideration without an actual petition before the Court. Accordingly, Petitioner shall advise the Court, no later than **June 17, 2003**, of the status of the case.

Ms. Bonner did file two "status reports," one in June and one in July saying she was working on the petition and she needed "at least six weeks additional time" to file the petition. However, these representations to the Court turned out to be untrue because no petition was filed.

Then, having heard nothing from Ms. Bonner for seven months, the Court on February 19, 2004, sua sponte entered the following Order (Doc. #7):

> Petitioner shall advise the Court, no later than March 15, 2004, of the status of the case. Failure to timely comply may result in dismissal of the case for failure to prosecute.

In response, Ms. Bonner finally was heard from again on March 15, 2004, filing a "status report" (Doc. #8) in which she stated that "Mr. Thomas apologizes for any lapse in providing status updates. At last Mr. Thomas has gathered virtually all the documentary and

investigative materials required. He would ask that this Court grant him leave to file his Motion to Vacate no later than March 19, 2004." The Court sua sponte entered an Order on March 18, 2004 (Doc. #9) advising Ms. Bonner that "leave is not required to file the petition for writ of habeas corpus" and that the Court will determine after the petition is filed whether it is timely. Finally, on March 22, 2004, almost a year to the day after Ms. Bonner had first requested this Court's appointment so that she could immediately file the petition, she in fact did so, missing the limitations deadline by over nine months.

This recitation reveals that Ms. Bonner's actions in securing an emergency appointment to represent Petitioner, in thereafter failing to file the petition in April 2003, after telling Petitioner she would do so, in thereafter willfully failing to file the petition even with the prodding of the Court and in willfully ignoring the

importance of filing within the limitations period, sets her conduct above mere professional negligence, and rises to the level of bad faith.

Moreover, Ms. Bonner herself has tried to explain her misfeasance as being the product of mental impairment she suffered as a result of a serious injury and "very severe and very overwhelming" stress caused by her health issues and that of her spouse. (Doc. #84 at 149-50, 154, 159); See also December 17, 2007, Transcript (Doc. #63) at 79-82). Of course, mental impairment is specifically mentioned in Holland as being one of the criteria which "can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling." Holland, 539 F.3d at 1339.

In arguing against equitable tolling, the state, among other things, asked the Court to "consider the possibility that Mary Catherine Bonner missed the

deadline in Thomas and Asay as part of a strategy to attack the AEDPA" (Doc. #104 at 16). The state goes on to say how few habeas cases actually win on the merits so that "[w]hile normally missing the deadline to file an action necessarily would not be a wise litigation tactic, it certainly could be in the federal habeas context." Id. at 17. Thus, the state concludes that "because relief on the merits is so unlikely, litigating equitable tolling could be more fruitful in terms of delay and be a reasonable tactic." Id. at 18.

If, as the state argues, Ms. Bonner missed the statute of limitations deadline on purpose, there is no evidence that she did so with the approval of her client. Indeed, ultimately, it would be the client who would suffer from the missed deadline because his case would not be heard on the merits (however unlikely it is that the state thinks that he will ultimately prevail on the merits). Thus, even if the state proved to be correct

about Ms. Bonner's motivations, its argument would prove too much because the Eleventh Circuit in Holland lists "divided loyalty" as one of the criteria which would justify equitable tolling based upon egregious attorney misconduct. If, as the state suggests, Ms. Bonner, with calculation, but without consulting her client, chose to miss the statute of limitations deadline on purpose, she has rendered disloyal service to her client, not to mention to this Court, which appointed her to represent Petitioner at her urgent request.

Having lived with this case from the beginning and having now reviewed all of the evidentiary materials, judging the credibility of the witnesses and being informed by the law, the Court finds that Petitioner Thomas has shown by a preponderance of the evidence the type of extraordinary circumstances beyond his control envisioned by the Eleventh Circuit in Downs and Holland to justify equitable tolling based

upon egregious attorney misconduct.

The Court also finds that Petitioner Thomas has been sufficiently diligent. The record demonstrates that he was actively participating with his counsel, Ms. Bonner, and previous counsel, Mr. Westling, and took all reasonable steps to ensure the timeliness of his attempt to seek federal habeas review (See Doc. #84 at 88-117; Doc. #102). Moreover, Petitioner submitted to Ms. Bonner a completed, signed habeas petition for filing on or about April 3, 2003. By this time, the Court had appointed Ms. Bonner to represent him in this Court and any effort by Mr. Thomas to file the petition himself likely would have resulted in the petition being stricken. See Thomas, 452 F.Supp.2d at 1206-1207, cited with approval in Downs, 520 F.3d at 1324 and n.10. Moreover, Petitioner Thomas was deceived by Ms. Bonner, who both told him she was filing the petition in April 2003 when she in fact did not, and who kept

advising him that his petition was already untimely when it was not. There was nothing more that Thomas could reasonably have been expected to do.

Selecting the period of equitable tolling is difficult. However, the Court determines equitable tolling began in April 2003 (about two months before the June 18, 2003 limitations deadline) when Petitioner had every right to assume that Mr. Bonner had filed his petition[20] until March 22, 2004 when the petition was filed. Thus, the petition filed by Mr. Thomas on March 22, 2004 is deemed timely.

EQUITABLE TOLLING AS TO ASAY

Mr. Asay's habeas case also involves the failure of the same attorney, Mary Catherine Bonner, to file his

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[20] The Court notes that pursuant to standard practice, once Ms. Bonner was appointed to represent Mr. Thomas, all copies of orders and other pleadings filed in the case were sent only to Ms. Bonner and not to Mr. Thomas. Thus, Petitioner was reliant on Ms. Bonner concerning the status of his case.

petition on time.

The Court conducted an evidentiary hearing on February 21, 2008. Petitioner Asay appeared by video-conference from the Florida Department of Corrections. He was represented at the hearing by Mr. Mills. Mr. Asay testified to the course of events leading up to the filing of his habeas petition. A large number of documents were introduced supporting his rendition of the events.[21] Of particular interest is the letter of July 1, 2002, from Heidi Brewer, his former Capital Collateral Regional Counsel (hereinafter CCRC), stating she was contemplating filing something in state court on the Ring issue, and meanwhile, she was working on the federal habeas corpus petition. Asay, Tab 1. Petitioner attested that he was aware that there was a

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[21] The Court accepts the redacted copies of the documents and will not require un-redacted copies of the documents to be submitted as they are not

federal time limitation and he knew that he needed to exhaust his state court remedies first. Tr. at 26.

Petitioner received a communication from attorney Dale G. Westling, Sr., dated July 7, 2003, stating that he had been appointed to represent Petitioner in his Rule 3.850 procedure. Asay, Tab 2. This occurred after the dismantling of CCRC North. Tr. at 27. Petitioner wrote Mr. Westling concerning his qualifications. Asay, Tab 3. Petitioner was concerned about whether Mr. Westling could represent him in federal court. Tr. at 29. Mr. Westling responded and assured Petitioner that he had been a member of the Federal Bar for twenty-eight years. Id. at 30; Asay, Tab 4.

Petitioner wrote a letter to Mr. Westling on July 21, 2003, informing him that, according to his former

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necessary for the purposes of this opinion. See Tr. at 13-15.

counsel, Ms. Brewer, his federal habeas petition will be due thirty days after the judge rules on the Ring issue. Asay, Tab 5. Petitioner attested that Ms. Brewer left him with a good understanding of his time limitations, independent of his own calculations. Tr. at 31. Mr. Westling wrote Petitioner on March 8, 2004, stating that he was attempting to contact Mary Catherine Bonner, a specialist in habeas proceedings. Asay, Tab 6.

Petitioner received a letter from Ms. Bonner, dated March 11, 2004, introducing herself. Asay, Tab 7. Petitioner understood that this was consistent with Mr. Westling's plan to bring her on board "so that she could begin to assimilate my case and begin to prepare for proceeding to federal court in a Rule 2254 petition." Tr. at 33. He also gleaned from the letter that Ms. Bonner was boasting of her federal court experience and her understanding of the rigid time limitations to proceed to federal court for death-sentenced inmates. Id. at 34-35.

On March 24, 2004, Mr. Westling wrote Petitioner a letter noting that Ms. Bonner was especially qualified to pursue time-barred proceedings in federal court. Asay, Tab 22. He added: "As you know, your time to file a habeas proceeding probably expired some years ago."[22] Id. Petitioner did not recall receiving that letter. Tr. at 36.

Petitioner filed Defendant['s] Pro Se Motion for a Status Hearing, dated April 15, 2004, Asay, Tab 8, in the circuit court because he was concerned that he was not receiving assurances from Mr. Westling or Ms. Bonner that they understood his federal time limitations. Tr. at 37. Petitioner understood that he had no more than thirty days, but perhaps as little as twenty-four days after issuance of the mandate from his second 3.850 motion to file his federal petition. Id. Petitioner requested a status conference in order to

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[22] This was incorrect. See pp. 4-6, *supra*.

clarify the status of his federal time limitations because neither attorney appeared to understand the requirements of AEDPA and the impact on his case. Asay, Tab 8. Petitioner was concerned that neither attorney had actually determined the amount of time Petitioner had remaining on the limitation period. Tr. at 37. Petitioner explained that he went to the circuit court because the circuit court had appointed Mr. Westling. Id. at 37-38.

Petitioner received a letter from Mr. Westling dated April 23, 2004, where he provided some historical facts concerning Petitioner's case. Asay, Tab 9. Petitioner attested that the record was inaccurate because it failed to reference the state habeas and the motion for rehearing of the state habeas petition. Tr. at 38. On April 27, 2004, Petitioner wrote Mr. Westling, noting that his *pro se* motion for a status hearing was returned by the circuit court unopened. Asay, Tab 10.

Petitioner asked for the status of his federal habeas time limitations. Id. He also asked about any steps undertaken to perfect his federal habeas corpus in a timely manner. Id. Finally, he stated he would take precautionary steps to ensure that he did not end up procedurally barred through no fault of his own. Id. Petitioner decided his next step was to contact Mr. Roger Maas, the Executive Director of the Commission on Capital Cases. Tr. at 41-42.

Mr. Westling wrote Ms. Bonner on May 3, 2004, asking her to respond to Petitioner's concerns about the federal habeas corpus time limitations. Asay, Tab 21. Petitioner did not remember receiving a copy of that letter. Tr. at 42.

On August 6, 2004, the circuit court entered an Order Striking Defendant's *Pro Se* "Motion for a Status Hearing." Asay, Tab 11. The order stated Petitioner was represented by competent counsel, and the motion was

not adopted by counsel. Id. Additionally, the circuit court entered an Addendum to Order Appointing Counsel, finding Mr. Westling meets the statutory requirements and the high ethical standards to represent someone sentenced to death. Asay, Tab 12.

Petitioner attested that he received the Supreme Court of Florida's order, dated December 20, 2004, affirming the circuit court's order summarily denying his successive motion to vacate judgment and sentence under Ring. Asay, Tab 13; Tr. at 45. Petitioner understood that the issuance of the mandate on this order would signify the restarting of his federal time limitations. Tr. at 45. Petitioner wrote Mr. Westling, on December 29, 2004, that his time was limited, and following mandate from the Supreme Court of Florida, he had as little as twenty-four days to process his federal petition. Asay, Tab 14. Petitioner provided his own calculations concerning the time remaining to

timely file a petition for writ of habeas corpus in federal court. Id.; Tr. at 46. Petitioner also notified Roger Maas of his concerns by separate letter. Asay, Tab 14, Tr. at 47-48. Mr. Westling, on January 4, 2005, wrote Ms. Bonner concerning Petitioner's letter, asking her to call at her earliest convenience. Asay, Tab 15.

On January 5, 2005, Roger Maas, the Executive Director of the Commission on Capital Cases, wrote Petitioner a letter in response to Petitioner's December 29, 2004 letter, explaining that Ms. Bonner had called him on January 4, 2005, she was aware of the issues Petitioner had raised, and she was giving them due consideration. Asay, Tab 16.

On January 12, 2005, Petitioner wrote Ms. Bonner (with copies to Mr. Westling and Mr. Maas), following up on a January 10, 2005 telephonic interview, and stated: "I am again instructing you to file my rule 2254 Petition in accordance with all Unite[d]

States Supreme Court and Eleventh Circuit case law and applicable Antiterrorism and Effective Death Penalty Act legislation only." Asay, Tab 17. Petitioner explained that it was during the January 10, 2005, interview that Ms. Bonner first referenced Carey v. Saffold.[23] Tr. at 49. During the interview, Petitioner said he wanted to stick with what they knew, and not to rely on Carey because he was unsure of the implications of that case. Id. He did not want to risk relying on Carey and he told Ms. Bonner to file his federal petition. Id. at 50.

On January 25, 2005, Petitioner wrote Ms. Bonner stating he had received the copy of Carey and that he did not consent to any delay in the filing of his 2254 petition based on Carey. Asay, Tab 18. Petitioner directed Ms. Bonner to file within the twenty-four day time period. Id.

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[23] Carey v. Saffold, 536 U.S. 214 (2002).

Petitioner received a letter dated January 31, 2005, from the Office of the Clerk, Supreme Court of Florida. Asay, Tab 19. Petitioner had written a letter to the Supreme Court of Florida Clerk asking to be informed when the mandate issued so he could keep track of his remaining time under AEDPA. Tr. at 52. The Clerk responded:

> The Florida Supreme Court has received the following documents reflecting a filing date of 1/28/2005 - Letter dated 01/25/2005, by Marc Asay Re: Mandate issuance.
>
> In response to the above letter, please be advised that this Court's Order dated December 20, 2004, is the final order. No motion for rehearing was filed and this case is considered final in this Court. No mandate will be issued.

Asay, Tab 19.

Petitioner wrote a letter to the Clerk of this Court dated February 8, 2005, chronicling the history of communications with his counsel and complaining that

his attorneys failed to properly and timely file a 2254 petition. Asay, Tab 20. He asserted that they ignored his explicit instruction to timely file a petition. Id. He stated that they never disabused him of the notion that a mandate would issue on the denial of his second Rule 3.850 motion to restart the federal clock. Id. He said: "Counsels[']' negligence is more egregious because counsel did not even bother to convey to Asay that no USC Rule 2254 Petition would be filed, rather counsel led Asay to believe it would be done and done on time, and then simply abandoned Asay at this most critical juncture." Id.

On March 7, 2005, in response to an order requiring counsel to respond to Asay's letter, Mr. Westling and Ms. Bonner advised the Court that Mr. Asay was being "cautious" and that in fact he has "approximately five months' time [left] in which to

timely file" his habeas petition. (Doc. #5 at 1).[24] This representation was patently incorrect; indeed, by March 2005, the deadline had already passed.

At the evidentiary hearing, Petitioner made the following argument:

> I'm alleging attorney misconduct. I'm alleging that Ms. Bonner deliberately and willfully lied to me to keep me off balance so that I would not take protective action and file a Rule 2254 in my case.
>
> I believe it can be extrapolated from everything that I've done that if Ms. Bonner had have told me at any time that she was not going to file within this 24 days that me and her were talking about, that I would have got my pen and paper out and wrote to the court within that 24-day time frame.

Tr. at 53.

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[24] On March 25, 2005, Petitioner filed another letter with the Court asking for "clarification" of whether his counsels' statements that Carey tolled the running of the limitations period was correct (Doc. #6).

After Petitioner testified, the Court relieved Mr. Westling and Ms. Bonner as counsel for Petitioner in his federal proceedings. Tr. at 65-68. Petitioner rested. Id. at 68. The Respondents called Mr. Westling and Ms. Bonner. Mr. Westling testified that he was admitted to the Bar in 1975, worked for the State Attorney's Office for almost three years, and then went into private practice. Id. at 71. He had been a member of the United States District Court, Middle District of Florida for twenty-eight years. Id. at 72.

Mr. Westling testified that he brought Ms. Bonner into the case because she was involved in the Ring issue and she did a lot of federal habeas work. Id. at 73. Mr. Westling stated he never lied to Petitioner and never promised to file a federal habeas by a certain date. Id. at 74. He referred the federal habeas issue to Ms. Bonner and informed Petitioner that she was taking it over. Id. Mr. Westling attested that he and Ms.

Bonner discussed the timeliness issue many times, and Ms. Bonner felt comfortable with her interpretation of the law at the time. Id. at 75.

Ms. Bonner attested that she did not lie to Mr. Asay. Tr. at 81. She explained her theory that the federal petition would be timely based on Carey:

> Well, I looked at the documents. And I know that not everybody agrees with me here. I looked at Carey v. Saffold. And I was convinced that Florida had a system set up much like California's, where there was no time limit given on the filing of a habeas corpus for ineffective assistance of appellate counsel.
>
> Consequently, it looked like it, to me, that it was one long process. And that is what I argued to -- to this court, that it was the -- those times were all removed from the calculations of the 2254.

Tr. at 81.

The state rested after Ms. Bonner's testimony. Id. at 84.

The state contends that Ms. Bonner and her colleague Mr. Westling made no affirmative misrepresentation to Asay that they had filed his federal habeas petition when in fact they had not. While this may be true, it does not fully capture the situation. The evidence is clear that Mr. Asay assiduously stayed on top of his lawyers, repeatedly asking them to calculate his deadline to be sure his federal habeas petition was timely. When they failed to do so, he complained to the state trial court and the state agency overseeing Capital Collateral Counsel (See Doc. #91 at 26-51; Exhibit 8 and Exhibit 14). After calculating the deadline himself, Asay, on January 10, 2005, directly advised Ms. Bonner over the telephone to file his federal habeas petition within twenty-four days of the Supreme Court of Florida issuing its mandate, which he expected in January. (Doc. #91 at 48-51). He followed up two days later with a letter giving her the same unambiguous

instruction (Exhibit 17). (Had she done so before January 17, 2005, the petition would have been timely under any scenario). On January 25, 2005, after receiving a copy of the U.S. Supreme Court decision that Ms. Bonner incorrectly told Asay provided for a later deadline, Asay instructed her not to rely on that case and stick to his earlier instruction (Exhibit 18). He testified that if Ms. Bonner had told him she was not going to follow this direction, he would have filed the petition himself. (Doc. #91 at 55). Indeed, on February 8, 2005, immediately after Asay realized that Ms. Bonner had not filed his petition as instructed, he filed a Letter in this Court.

At the evidentiary hearing, the state asked Ms. Bonner only a limited set of questions designed to show that she did not directly "lie" to Asay. But Ms. Bonner offered no testimony as to what she told Mr. Assay in these phone conversations or in response to his letters

and made clear that while she was aware of the limitations deadline, she deliberately chose to ignore it (without Asay's consent and in the face of his protests) to try to rely on a new theory of tolling which all objective observers, including the state, believe has absolutely no merit whatsoever. The terms "bad faith" or "dishonesty" capture Ms. Bonner's conduct and are the type of egregious conduct that rises well above professional negligence or even gross negligence. Combining this with Ms. Bonner's already noted mental impairments during this time and giving some credence to the state's view that Ms. Bonner deliberately chose to miss the limitation deadline (even against her client's expressed wishes), thereby creating "divided loyalty" between Mr. Asay and Ms. Bonner, and even the high bar set by Holland is met. Recognizing that equitable tolling applies "only in truly extraordinary circumstances" and "is typically applied sparingly,"

Johnson v. United States, 340 F.3d 1219, 1266 (11th Cir. 2003) (citations omitted), aff'd, 544 U.S. 295 (2005), the circumstances that this Petitioner has proven, which will hopefully be rare, meet this test. Moreover, it is hard to imagine how a Petitioner could be more diligent in the pursuit of a timely federal habeas filing.

The period of equitable tolling runs from at least January 10, 2005, when Petitioner unambiguously instructed Ms Bonner to file his habeas petition, until the date of filing of the petition on August 15, 2005. Alternatively, the equitable tolling period runs from January 10, 2005, until February 8, 2005, when Petitioner, after realizing that Ms. Bonner had refused to file the petition on time, filed a letter which the state has referred to as a habeas petition.[25]

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[25] Another aspect of the equitable tolling analysis is the confusion over whether the Florida Supreme Court would issue a mandate following its December 20, 2004 denial of Asay's second Rule 3.850 motion based on Ring

v. Arizona. See Docs. #40, #43, #68 & #65. Because a mandate had issued from the affirmance of the denial of Petitioner's first Rule 3.850 motion, Petitioner had reasonably assumed that a mandate would also issue following denial of the second motion. However, when one did not timely issue, Petitioner promptly wrote the Clerk of the Supreme Court of Florida who advised by letter dated January 31, 2005 that no mandate would be issued and that the December 20, 2004 Order was final. (Asay, Tab 19). Petitioner, realizing after receiving this letter from the Clerk that no mandate would issue, promptly filed his "letter petition" in this Court on February 8, 2005. Assuming that the Clerk's letter of January 31, 2005 notified Petitioner that the federal habeas clock was again running, Petitioner's filing of the letter on February 8th would be timely (assuming there were twenty-six days remaining in the one year period). Thus, because of the confusion regarding issuance of the mandate, which was not resolved until the January 31, 2005 letter issued by the Clerk of the Florida Supreme Court, Petitioner's February 8, 2005 letter is either timely under the statute or equitable tolling should be applied to render it timely. At the very least, the time from the Florida Supreme Court's December 20, 2004 decision until the Florida Supreme Court Clerk advised on January 31, 2005 that no mandate would issue is subject to equitable tolling. Thus, if Ms. Bonner had heeded Asay's entreaty to file the petition in January or even February 2005, it would have been timely.

CONCLUSION

The Court is aware that the Eleventh Circuit has set a very high threshold to meet the requirements of equitable tolling based on a habeas petitioner's counsel's misfeasance. In the first case of this unfortunate trilogy, Damren, the Court has concluded that equitable tolling was not appropriate, notwithstanding the gross negligence of petitioner's counsel. However, acknowledging that the line between "gross negligence" and "bad faith" or "divided loyalty" is hard to draw, the Court concludes that Thomas and Asay are the rare cases where equitable tolling should be applied.[26] Nevertheless, recognizing that these cases have already taken too long to resolve and that the Eleventh Circuit, which reviews equitable tolling issues de novo, may

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[26] In so doing, the Court takes no pleasure in criticizing lawyers who have stepped "into the breach of capital litigation where relatively few lawyers will tread." Thomas, 452 F.Supp.2d at 1206.

have a different view, the Court will certify these cases for interlocutory appeal should the state wish to seek it. If not, the Court will endeavor to decide the cases on the merits on an expedited basis.[27]

It is hereby

ORDERED:

1. In Thomas, Case No. 3:03-cv-237-J-32, Respondents' request that the Court dismiss Petitioner's habeas petition as time barred, contained within Respondents' Limited Response in Opposition to the Petition for Writ of Habeas Corpus (Doc. #15) and the supplements to that response (Docs. #25 and #26), is **DENIED**.

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[27] As I have previously said: "I have no idea whether any of these petitioners have meritorious federal habeas claims. . . . Certainly, the state courts in each case have concluded, after painstaking review, that the death sentences are proper. But, the law provides for federal habeas review in capital cases and this Court is therefore obliged to provide due and proper process to these petitioners." Id.

2. In Asay, Case No. 3:05-cv-147-J-32, Respondent's request that the Court dismiss Petitioner's habeas petition as time barred, contained within Respondents' Limited Response in Opposition to the Petition for Writ of Habeas Corpus (Doc. 16), is **DENIED**.

3. The Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292 (b). Therefore, any party who wishes to do so may apply to the Eleventh Circuit within **TEN (10) DAYS** after entry of this Order seeking an interlocutory appeal. If the interlocutory appeal is sought and accepted by the Eleventh Circuit, no further activity will be undertaken in these cases until the interlocutory appeal is resolved.

4. If no interlocutory appeal is taken, the

Court will conduct a telephone status conference to determine whether Petitioners' current counsel, John Mills, will be representing Petitioners on the merits and, if not, to arrange for the appointment of new counsel.[28] Moreover, a time for Respondents to respond on the merits will be set.

5. The Clerk will send out a separate notice of telephone hearing.

6. All other pending motions are to be termed as either denied or moot.

DONE AND ORDERED at Jacksonville, Florida this 10th day of February, 2009.

TIMOTHY J. CORRIGAN
United States District Judge

sa 2/10
Copies to:
Counsel of Record

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[28] The Court has previously relieved both Dale Westling and Mary Catherine Bonner as counsel in these cases.

IN THE UNIED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-90005-P

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 18 2009
THOMAS K. KAHN
CLERK

STATE OF FLORIDA,
FLORIDA ATTORNEY GENERAL

Petitioners-Appellants,

versus

MARK JAMES ASAY,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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BEFORE: BIRCH, BLACK and PRYOR, Circuit Judges.

BY THE COURT:

Appellants' petition for permission to appeal pursuant to U.S.C. 1292(b), is DENIED.

IN THE UNIED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-90005-P

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 20 2009
THOMAS K. KAHN
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STATE OF FLORIDA,
FLORIDA ATTORNEY GENERAL

Petitioners-Appellants,

versus

MARK JAMES ASAY,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: BIRCH, BLACK and PRYOR, Circuit Judges.

BY THE COURT:

Appellants' motion for reconsideration of this Court Order denying appellants' petition for permission to appeal pursuant to U.S.C. 1292(b), is DENIED.

(2)

No. 09-216

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2009

WALTER A. McNEIL,

Petitioner,

v.

MARK JAMES ASAY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

John S. Mills
Mills Creed & Gowdy, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
jmills@appellate-firm.com

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

The Respondent disputes that the Question Presented, as stated in the Petition, adequately sets forth the questions the Court would need to decide if it grants review. Thus, he presents his own version:

1. In a capital habeas proceeding, does 28 U.S.C. § 2254(i), which provides that the "ineffectiveness or incompetence" of post-conviction counsel "shall not be grounds for relief in a proceeding arising under section 2254," prohibit a district court from ever equitably tolling the limitations period for habeas petitions based on the affirmative misconduct of court-appointed counsel?

2. In light of this Court's holding in *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006), that a Florida application for post-conviction review remains pending for purposes of tolling the AEDPA limitations period between the time a Florida appellate court issues an opinion affirming the trial court's denial of the application and the time the appellate court issues its mandate, when does the period begin to run again when a Florida appellate court refuses to issue a mandate?

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SUPREME COURT OF THE UNITED STATES

October Term, 2009

WALTER A. McNEIL,

Petitioner,

v.

MARK JAMES ASAY,

Respondent.

Respondent's Brief in Response to the Petition for a Writ of Certiorari

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The respondent Mark James Asay readily concedes that the petition raises an extremely important question of federal law on which the courts of appeals are deeply divided. Mr. Asay files this brief in opposition in order to provide a more complete and accurate statement of facts than presented in the petition, to point out that this may not be the best vehicle to resolve the primary question presented, and to address a jurisdictional wrinkle not adequately addressed in the petition.

STATEMENT OF THE CASE

A. The Deadline for Mr. Asay's Habeas Petition

Although the district court stated that the one-year limitations period for Mr. Asay's habeas petition expired on January 17, 2005, the facts related in its order demonstrate that the period continued beyond that date either as a result of statutory tolling or separate equitable tolling unrelated to the conduct of Mr. Asay's counsel.

Mr. Asay's conviction and death sentence became final in 1991, when this Court denied his petition for a writ of certiorari on his direct appeal. He filed his first application for state post-conviction relief in 1993, and it remained pending until after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 (1996). The one-year AEDPA limitations period began to run on December 1, 2000, when the Supreme Court of Florida issued its mandate after affirming the denial of the first application. *See* 28 U.S.C. § 2244(d)(2) (2006) (providing that the one-year limitations period is tolled as long as a properly filed application for state post-conviction review is pending); *Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999) (holding that when a state post-conviction proceeding is pending as of April 24, 1996, the one-year limitations period begins to run when the proceeding is finally concluded), *cert. denied*, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000).

The period ran for 327 days until October 25, 2001, when Mr. Asay filed his second application for state post-conviction relief, a petition for a writ of habeas corpus filed directly in the Supreme Court of Florida. Pursuant to § 2244(d)(2), this tolled the limitations period until October 4, 2002, when the state supreme court denied rehearing of its denial of the habeas petition.[1] Thus, at that point, Mr. Asay had 38 days left to file a federal habeas petition.

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[1] No mandate issued because this was an original habeas proceeding in the Supreme Court of Florida, not an appeal. *Johnson v. Singletary*, 618 So. 2d 731 (Fla. 1993).

The period ran for another 12 days until October 17, 2002, when Mr. Asay filed his third application for state post-conviction relief, a motion in the trial court seeking relief under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Thus, he had 26 days left on the limitations period to file his federal habeas petition after the third post-conviction proceeding concluded.

The Supreme Court of Florida affirmed the trial court's denial of the application by opinion dated December 20, 2004. If that is the date that the application is deemed to have been finally denied, then Mr. Asay's habeas petition was due January 17, 2005, as represented in the petition. However, the district court noted that there was substantial confusion as to whether the December 20, 2004, opinion finally disposed of the post-conviction proceeding. (Pet. App. at A60-61.)

When the state supreme court affirmed the trial court's denial of Mr. Asay's first application for post-conviction review, it issued a mandate a couple of weeks following its opinion. *See* Fla. R. App. P. 9.340(a) (2004) (providing that clerks of appellate courts in Florida must issue a mandate within fifteen days of an appellate opinion unless otherwise ordered by the court). The district court used the date of the mandate, and not the date of the opinion, as the date the AEDPA period started running again under § 2244(d)(2). When no mandate issued after the December 20, 2004, opinion affirming the denial of the second state post-conviction application, Mr. Asay wrote a letter to the clerk of the state supreme court inquiring when it would issue. In a letter dated January 31, 2005, the clerk responded that no

mandate would issue.[2] The district court held that, as a matter of either statutory or equitable tolling, the AEDPA period did not begin to run again until the date of that letter. (Pet. App. at A60-61 n.25.) The State has not sought to challenge this ruling either in its petition for leave to appeal to the court of appeals or in its petition to this Court. Thus, the AEDPA period did not expire until Monday, February 28, 2005, before taking into account the possibility of equitable tolling based on the conduct of counsel.

B. The Date Mr. Asay Filed His Habeas Petition

The district court held that Mr. Asay "initiated" his federal habeas proceeding by filing a *pro se* letter with the court on February 8, 2005. (Pet. App. at A-10.) On August 15, 2005, Mr. Asay's counsel filed a formal petition for writ of habeas corpus. While the bulk of the district court's opinion refers to the latter date as the date he filed his petition for purposes of the AEDPA period, the court held, in the alternative, that it was filed on February 8, 2005, when Mr. Asay filed his *pro se* letter. (Pet. App. at A-60.) As the court noted, the State itself referred to this letter

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[2] On July 31, 2006, the undersigned counsel filed a formal motion on Mr. Asay's behalf asking the state supreme court to issue its mandate, explaining the importance of the mandate for calculating the AEDPA deadline, and citing case law from Florida, the Eleventh Circuit, and this Court that all indicate that a post-conviction proceeding remains pending between the date of an opinion affirming the denial of relief and the date of the mandate. The supreme court denied that motion without explanation on August 16, 2006.

as a habeas petition. (*Id.*) Thus, under this alternative holding, Mr. Asay's petition was timely even if the conduct of his counsel did not equitably toll the AEDPA period. The State did not seek to challenge this ruling either in its petition for permission to appeal to the Eleventh Circuit or in its petition to this Court.

C. Facts Supporting Application of Equitable Tolling

Mr. Asay was originally represented by lawyers from Florida's Office of Capital Collateral Regional Counsel ("CCRC"), a publicly funded law office created for the sole purpose of providing representation to indigent death row inmates. In July 2002, while his state habeas petition (the second post-conviction proceeding) was pending in the Supreme Court of Florida and he still had 38 days left in the AEDPA period, Mr. Asay's CCRC lawyer wrote him to advise that she had filed a motion for rehearing because the court had denied the petition. She advised that if that motion were denied, she would file another post-conviction motion in the trial court based on this Court's *Ring* decision, which had just come down. She advised that she would likely file that motion within 30 days of the denial of rehearing and that this would again toll the AEDPA limitations period. As noted above, she filed that motion on October 17, 2002, just 12 days after the denial of rehearing. This left 26 days remaining in the AEDPA period.

In July 2003, while the *Ring* motion was still pending, Mr. Asay received a letter from attorney Dale G. Westling, Sr., indicating that Mr. Westling, a private attorney, had been appointed by the Florida court to take over as Mr. Asay's counsel after the CCRC office for Mr. Asay's region of Florida had been disbanded. Mr. Asay immediately wrote Mr. Westling to inquire whether Mr. Westling was licensed

to practice in federal court and to ask that Mr. Westling immediately address this matter because "my case is quickly advancing to the Federal Appeals level." Mr. Westling promptly responded and indicated that he had been a member of the local federal bar for 28 years. Mr. Asay replied with another letter that emphasized that his upcoming federal habeas petition was very important and advised that the CCRC lawyer had told him the petition would be due around 30 days after the *Ring* motion was finally denied.

In March 2004, while the *Ring* proceeding was still pending, Mr. Westling advised that he wanted to bring on a new lawyer, Mary Catherine Bonner, whom he described as specializing in federal habeas work. About the same time, Ms. Bonner wrote Mr. Asay to explain that she wanted to get started right away preparing for the federal petition because it would take time for her to get up to speed. She boasted of her federal habeas experience, specifically including expertise in calculating the AEDPA deadline, and about the amount of time she spends in preparation.

A few weeks later, Mr. Westling sent another letter to Mr. Asay again touting Ms. Bonner's expertise. He went on to advise:

> She is especially qualified because she has pursued "time barred" proceedings in the past. As you know, your time to file a habeas proceeding probably expired some years ago.

This last statement was inaccurate, of course, as Mr. Asay had 26 days left on the limitations period once the *Ring* proceeding was concluded.

After speaking with Ms. Bonner about the subject, Mr. Asay became very concerned that neither of his lawyers understood the AEDPA limitations period,

and he filed a *pro se* request for a status conference with the state trial court to help him to ascertain the status of the AEDPA period. The trial court struck the *pro se* motion as unauthorized because it was not filed by Mr. Asay's appointed counsel, Mr. Westling. The order went on to state that Mr. Westling "meets the statutory requirements and has the high ethical standards necessary to represent a defendant in a capital case."

Mr. Asay wrote to Mr. Westling imploring him to analyze the AEDPA deadline and advise when the federal habeas petition would be due. After the Supreme Court of Florida entered its order affirming the denial of the *Ring* motion, Mr. Asay wrote Mr. Westling with his own calculations of the AEDPA deadline. He calculated that the habeas petition had to be filed 24 days after the court issued its mandate. He sent a copy of this letter to Roger Maas, the executive director of the Florida Legislature's Commission on Capital Cases. Mr. Maas wrote back that he had spoken with Ms. Bonner, and he assured Mr. Asay that Ms. Bonner was aware of the timing issues and would "give them due consideration."

Mr. Asay spoke to Ms. Bonner on January 10, 2005, and instructed her to file his federal habeas petition within 24 days of the mandate by the Supreme Court of Florida. He followed this up with another letter to Ms. Bonner expressly directing her to file his federal habeas petition within the AEDPA period. He went on to state:

> It is my belief that under all applicable guidelines my Rule 2254 Petition must be properly filed no more than twenty-four days following the Mandate of my 2nd Rule 3.850 which was affirmed by

> The Florida Supreme Court on December 20th 2004. This Mandate is due in January 2005.

He copied Messrs. Moss and Westling with this letter.

Around this time, Ms. Bonner met with Mr. Asay to discuss the matter. She told him that she believed that under this Court's decision in *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002), an argument could be made that he had a full year to file a federal habeas petition following the conclusion of the state post-conviction process.

Shortly thereafter, on January 25, 2005, Mr. Asay wrote Ms. Bonner to advise of his instructions:

> I DO NOT CONCENT [sic] TO ANY DELAY IN FILING A Rule 2254 Petition in my case based in Carey v. Saffold.
>
> As it stands in my case under the known Application of Law and requirements of The A.E.D.P.A. legislation, I have Twenty four days to timely and properly file a Rule 2254 Petition. And I am directing you to do so accordingly.
>
> To rely on Carey v. Saffold is to unnecessarily risk my Federal Appellate review. Please do not do so.

He again copied Messrs. Moss and Westling.

Shortly thereafter, he received the January 31, 2009, letter from the clerk of the Supreme Court of Florida advising that no mandate would issue. He promptly assembled the above-referenced correspondence and prepared a detailed *pro se* filing that he sent to the clerk of the district court. He stated that his court-appointed lawyers had ignored his pleas and allowed the time for him to file a habeas petition in federal court to expire. He advised that had he known they were not going to file it on time, he would have done so himself. He advised that his

attorney had falsely led him to believe they would timely file the petition but instead abandoned him. He asked that the court allow him to file a habeas petition out of time.

The district court ordered Ms. Bonner and Mr. Westling to respond to Mr. Asay's allegations. They responded in a letter dated March 7, 2005 (after the AEDPA deadline had lapsed) that Mr. Asay was simply being "cautious" and that he actually had about five months left in the limitations period. It was not until August 15, 2005, that Ms. Bonner filed a formal habeas petition on Mr. Asay's behalf.

After initial briefing by the parties on the timing issue demonstrated that the conduct of Mr. Asay's court-appointed counsel was called into serious question, the district court appointed the undersigned attorney to represent Mr. Asay on the limited purpose of addressing the timing issue. The court eventually conducted an evidentiary hearing at which it heard live testimony by Mr. Asay (via video-conference from death row), Mr. Westling, and Ms. Bonner.

Ms. Bonner did not dispute any of the facts related above. In her defense, she explained that she had been facing personal issues that were "very severe and very overwhelming." These issues began when she came home and found her husband of 40 years lying on the floor after having suffered a stroke. She had no other family and this event was "monumental" to her, partly because she had similarly found her father on the floor after a stroke when she was only 13. The following spring, she was hospitalized with anemia, a serious concern as she had only recently overcome

a battle with cancer. Shortly after that, while she was caring for her husband, Ms. Bonner fell and suffered a "terrific closed-head injury" and also broke her arm. And shortly after that, her husband began suffering a series of seizures or possible heart attacks and ultimately required open-heart surgery.

The State argued in part that the failings of Mr. Asay's counsel amounted to nothing more than garden variety negligence, which does not support equitable tolling. But it also asked the court to consider the "possibility" that Ms. Bonner had intentionally filed the petition late "as part of a strategy to attack the AEDPA."

The court ultimately made findings of fact establishing the above-related facts. The court concluded:

> The terms "bad faith" or "dishonesty" capture Ms. Bonner's conduct and are the type of egregious conduct that rises well above professional negligence or even gross negligence. Combining this with Ms. Bonner's already noted mental impairments during this time and giving some credence to the state's view that Ms. Bonner deliberately chose to miss the limitation deadline (even against her client's expressed wishes), thereby creating "divided loyalty" between Mr. Asay and Ms. Bonner, and even the high bar set by [Eleventh Circuit precedent] is met. Recognizing that equitable tolling applies "only in truly extraordinary circumstances" and "is typically applied sparingly," the circumstances that this Petitioner has proven, which will hopefully be rare, meet this test. Moreover, it is hard to imagine how a Petitioner could be more diligent in the pursuit of a timely federal habeas filing.

(Pet. App. A-59-60 (citations omitted).)

D. The Other Two Cases in the "Unfortunate Trilogy"

In addition to Mr. Asay's case, the district court (through the same judge) considered two other Florida death row inmates whose counsel had missed the AEDPA deadline: William Greg Thomas and Floyd Damren. The court appointed the undersigned counsel to represent all three defendants and conducted

evidentiary hearings on the equitable tolling question in all three cases at the same time. The court summarized its ultimate conclusions in the three cases as follows:

> The Court is aware that the Eleventh Circuit has set a very high threshold to meet the requirements of equitable tolling based on a habeas petitioner's counsel's misfeasance. In the first case of this unfortunate trilogy, *Damren*, the Court has concluded that equitable tolling was not appropriate, notwithstanding the gross negligence of petitioner's counsel. However, acknowledging that the line between "gross negligence" and "bad faith" or "divided loyalty" is hard to draw, the Court concludes that *Thomas* and *Asay* are the rare cases where equitable tolling should be applied.

Mr. Thomas was also represented by Mr. Westling and Ms. Bonner, and the district court found that equitable tolling should apply for largely the same reasons as in Mr. Asay's case. Mr. Thomas's case has followed the same procedural posture since then: the district court certified its equitable tolling ruling for an interlocutory appeal under 28 U.S.C. § 1292(b), the court of appeals denied the State's petition for leave to appeal, and the State has petitioned this Court for a writ of certiorari. The main difference between Mr. Thomas' and Mr. Asay's cases is that the issue involving the Supreme Court of Florida failing to issue a mandate is not present in Mr. Thomas' case. Mr. Thomas' petition is pending in this Court as Case Number 09-234, and he is preparing a brief in opposition that concedes that a writ of certiorari should issue to decide the equitable tolling question presented in the State's petitions in his case and in Mr. Asay's case.

E. Deficiencies in Florida's Provision of Counsel for Post-Conviction Proceedings in Capital Cases

Messrs. Asay, Thomas, and Damren are not the only Florida death row inmates who have missed the AEDPA deadline and face the possibility of having no

federal review whatsoever due to the conduct of their court-appointed counsel. At the evidentiary hearing in these cases, Mr. Asay identified 21 defendants currently on Florida's death row whose court-appointed counsel failed to file their federal habeas petitions within the AEDPA limitations period.

Indeed, Florida stands out as providing an alarmingly deficient level of representation to capital defendants. The state legislature originally created the CCRC to provide effective representation to capital defendants who could not afford their own counsel to represent them in post-conviction proceedings in state and federal court. The CCRC was originally divided into three regional offices, but the office for the northern region of Florida was disbanded. Thus, capital defendants from this part of the state are no longer represented by CCRC attorneys. Instead, they are represented by attorneys appointed from a state registry of private attorneys.

Experience has shown, however, that the registry system has been a disaster in practice. The district judge in this case noted that it was very difficult to find competent attorneys to accept these appointments. And there is ample evidence that registry counsel provide a much lower level of competent representation than CCRC attorneys. For example, even though the majority of Florida death row inmates are still represented by CCRC counsel from the other two regions, 19 out of the 21 death row inmates who have missed their AEDPA filing deadlines were represented by registry counsel.

A recent report by the American Bar Association titled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report" (the "ABA Report")[3] concluded:

> Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

The report notes that Florida has sentenced more innocent defendants to die than any other state.[4] The report concludes that Florida suffers from a lack of qualified and properly monitored registry attorneys to handle cases outside of the CCRC regions and that the state provides grossly inadequate compensation to attract high quality lawyers to the registry. In the average capital case, registry counsel can expect to be paid about $25 an hour.[5]

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[3] This report can be found at http://www.abanet.org/moratorium/assessmentproject/florida/report.pdf.

[4] According to the report, since 1973, 22 Florida death row inmates have been exonerated, and 60 have been executed.

[5] Registry attorneys are paid $100/hour, but the total fee is capped at $84,000. Fla. Stat. § 27.711(4) (2009); *see also* Fla. Stat. § 27.7002(5) (2009) (prohibiting use of state funds to exceed the cap); *but see Olive v. Maas*, 811 So. 2d 644, 653-54 (Fla. 2002) (construing § 27.711(4) to authorize trial courts to award higher fees in capital cases where extraordinary or unusual circumstances exist);

And a 2007 audit of Florida's capital collateral counsel system (the "CCRC Audit"),[6] demonstrates the tremendous disparity in the comparative competence of CCRC and registry counsel. For example, the report found that CCRC counsel timely file federal habeas petitions 93% of the time, compared to registry counsel who file timely habeas petitions only 73% of the time. As of June 2006, eight Florida death row inmates had lost their right to federal review because their counsel failed to timely file their habeas petitions, and seven of those inmates were represented by registry counsel. Registry attorneys interviewed far fewer witnesses and used far fewer experts than CCRC counsel. Registry attorneys spent about one-fifth the time per case than CCRC attorneys. Unsurprisingly, defendants represented by registry counsel prevailed in a far smaller percentage of cases.

Maas v. Olive, 992 So. 2d 196, 198 (Fla. 2008) (construing § 27.7002(5) to not apply where trial court has found extraordinary or unusual circumstances).

The ABA report notes that the Spangenberg Group, which it considers to be the nation's leading expert on the delivery of indigent defense services, estimates that 3,300 attorney hours are required in the average capital post-conviction process at the state level alone. Thus, in the average capital case – i.e., a case not presenting extraordinary or unusual circumstances – a registry attorney can expect to be paid about $25/hour.

[6] The report was prepared by the Florida Auditor General pursuant to Fla. Stat. § 27.701(2) (2005). It can be found at www.myflorida.com/audgen/pages/pdf_files/2007-092.pdf.

Finally, justices of the Supreme Court of Florida have been outspoken in their criticism of the quality of registry counsel. Then-Chief Justice Barbara Pariente wrote a letter to the chair of the state senate committee on criminal appropriations urging that the disbanded CCRC regional office be reinstated based on the unanimous view of the justices of that court that the private attorney registry system in north Florida has been a failure. And then-Justice Raoul Cantero testified to a legislative committee that the representation provided to capital defendants by registry counsel constituted "some of the worst lawyering" he has ever seen.

All of this information was presented to the district court below, although the court found much of it to be irrelevant to the issue of whether Mr. Asay was entitled to equitable tolling.

ARGUMENT

I. The Issue of Whether § 2254(i) Bars Equitable Tolling Based on Attorney Misconduct Warrants Review by This Court Because It Is an Important Question of Federal Law on Which the Courts of Appeals Are Deeply Divided.

While he disputes the State's position on the merits, including its assertion that the ruling below is in conflict with any decision from this Court, Mr. Asay concedes that there is a deep split among the courts of appeals on the issue of whether attorney misconduct can support equitable tolling of the AEDPA limitations period. He also concedes that this is an issue of paramount importance that merits prompt review by this Court.

Mr. Asay further notes that the issue is best decided in a case like this one – a capital case involving the misconduct of court-appointed registry counsel from Florida. Because "death is different," capital cases frame the issue in its most compelling terms and implicate arguments not available to non-capital defendants seeking the benefit of equitable tolling. *Compare Fahy v. Horn*, 240 F.3d 239, 244-45 (3d Cir.) (holding that a relatively more lenient standard for equitable tolling should apply in capital cases), *cert. denied*, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001), *with Rouse v. Lee*, 339 F.3d 238, 254-55 (4th Cir. 2003) (*en banc*) (concluding that this Court's "death is different' precedents only apply to issues regarding procedural safeguards at trial and not in appellate or post-conviction proceedings), *cert. denied*, 541 U.S. 905, 124 S. Ct. 1605, 158 L. Ed. 2d 248 (2004).

Cases like this one that involve the conduct of court-appointed counsel raise questions regarding the applicability of agency theory, which is the basis for some courts' refusal to apply equitable tolling based on attorney conduct. *Compare Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) (holding that because an attorney is the agent of the client, a habeas petitioner cannot obtain equitable tolling based on even intentional misconduct of his counsel), *with Downs v. McNeil*, 520 F.3d 1311, 1320-21 (11th Cir. 2008) (rejecting reasoning in *Powell* because of exceptions to the rule that an agent's actions are attributable to his principal and holding that serious attorney misconduct overcomes the effect of agency)

Finally, the issue is perhaps best framed in a case involving serious misconduct by Florida registry counsel. Given the demonstrable failings in this

system and the grossly disparate quality of representation by registry counsel compared to CCRC counsel, serious equal protection and due process questions can arise if § 2244(i) is interpreted not just to preclude habeas *relief* for ineffective assistance of counsel, but to preclude habeas *review* where the incompetence and malfeasance of counsel resulted in an untimely habeas petition.

Whether in this case or another,[7] this Court should determine whether and under what circumstances a capital defendant may be entitled to equitable tolling based on the conduct of his or her counsel.

II. Due to the Mandate Issue in this Case, the Court May Conclude that the Pending *Thomas* Case Provides a Better Vehicle to Decide the Equitable Tolling Issue.

While Mr. Asay agrees with the State that the equitable tolling question merits review by this Court, a unique feature of this case may warrant the Court

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[7] There are two other petitions pending in this Court by Florida capital inmates who missed their AEDPA deadline due to the actions of their court-appointed registry counsel. In addition to the companion case of *McNeil v. Thomas*, Case No. 09-234, Albert Holland has filed a petition for writ of certiorari in *Holland v. Florida*, Case No. 09-5327.

Holland is less suited as a vehicle to decide the issue because it did not involve affirmative misconduct by counsel. Rather, the question presented in that case is whether the "gross negligence" of counsel can support equitable tolling. Additionally, while the parties in both this case and *Thomas* agree that certiorari review is appropriate, the State opposes certiorari in *Holland*.

granting certiorari in the related *Thomas* case and keeping Mr. Asay's case pending. Even if the Court were to conclude that equitable tolling is never available based on the misconduct of counsel, the ultimate ruling below in this case would still stand. In a footnote, the district court reached an alternative holding that Mr. Asay's petition was timely regardless of his attorney's conduct because the Supreme Court of Florida never issued a mandate after affirming the trial court's denial of relief under *Ring*. (Pet. App. at A-60-61 n.25.)

Both the Eleventh Circuit and this Court have held that a post-conviction proceeding initiated in a Florida state court is still pending for purposes of § 2244(d)(2) even after an appellate court affirms the denial of relief and that it remains pending until the appellate court issues its mandate. *Day v. McDonough*, 547 U.S. 198, 203, 126 S. Ct. 1675, 1680, 164 L. Ed. 2d 376 (2006) (citing *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000)).

Unless and until *Nyland* and *Day* are overturned, binding precedent in the district court dictates that Mr. Asay's final application for state post-conviction review remains pending to this day. At the very least, the application remained pending – and therefore tolled the AEDPA deadline under § 2244(d)(2) – until the clerk of the supreme court indicated that no mandate would issue. This matter may warrant certification to the Supreme Court of Florida to resolve the apparent conflict between its disposition of Mr. Asay's appeal and published decisions of that court and lower Florida courts that all indicate that an appeal does not become final in Florida until a mandate issues. *See, e.g., H.R.S. v. South Beach Pharmacy*, 635

So. 2d 117, 120 (Fla. Dist. Ct. App. 1994) ("Only upon issuance of the mandate does the appellate court's decision become final."); *State ex rel. Davis v. Clearwater*, 146 So. 836, 837 (Fla. 1933) (Whitfield, J., concurring) ("Where on appeal or writ of error, the Supreme Court affirms or reverses a judgment, decree or order, such court does not lose jurisdiction of the cause until the mandate of the Supreme Court is duly remitted to, and received in, the office of the clerk of the lower court.").

The point is that if the Court were to grant review in this case and ultimately find in favor of the State on the primary issue presented, it would have to also address the somewhat complicated mandate issue. Thus, this case may not be the best vehicle for the Court to decide the tolling issue. The *Thomas* case may be a better vehicle because it does not have the same complication, but otherwise raises largely the same issue of equitable tolling based on attorney misconduct.

III. The Court of Appeals' Denial of the State's Petition for Leave to Appeal Under 28 U.S.C. § 1292(b) Does Not Present a Vehicle Problem.

The State's petition correctly states that this Court has jurisdiction over this case, but it glosses over the fact that the court of appeals denied the State's petition for permission to appeal under 28 U.S.C. § 1292(b). This Court has statutory certiorari jurisdiction to review "[c]ases in the courts of appeal." 28 U.S.C. § 1254(1) (2006).[8] An argument could be made that because the court of appeals denied the

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[8] The full text of the relevant statutory provision is as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

State's application for permission to appeal under § 1292(b),[9] this case was never "in the courts of appeal." For example, the Court once ruled that it lacked statutory certiorari jurisdiction in habeas cases where the court of appeals denied a certificate of probable cause, which was a prerequisite for the court of appeals to have appellate jurisdiction. *House v. Mayo*, 324 U.S. 42, 44, 65 S. Ct. 517, 519, 89 L. Ed. 739 (1945), *overruled by Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

The Court does not appear to have ever discussed the applicability of § 1254(1) when a court of appeals denies an application for review under § 1292(b), but it has exercised its jurisdiction at least once to review a case in that procedural

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> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ....

28 U.S.C. § 1254 (2006).

[9] This statute provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, it shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (2006).

posture. In *Tidewater Oil Co. v. United States*, 409 U.S. 151, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972), the Court reviewed and affirmed a court of appeals' decision to deny leave to appeal pursuant to § 1292(b). Although it did not address the basis for its own jurisdiction, the Court held that the court of appeals properly denied leave to appeal because interlocutory appeals are prohibited in government civil antitrust suits pursuant to section 2 of the Expediting Act of 1903, 32 Stat. 823. *Id.* at 173-74, 93 S. Ct. at 421.

Perhaps more importantly, the Court has reconsidered and overruled its holding in *House v. Mayo* and has concluded that it does have jurisdiction under § 1254(1) over a habeas appeal even where the court of appeals denied a certificate of appealability. *Hohn*, 524 U.S. at 253, 118 S. Ct. at 1978. In *Hohn*, the Court concluded that the court of appeals' consideration and denial of the habeas petitioner's request for a certificate of appealability constituted a "case in the court of appeals" and therefore the Court had jurisdiction to review the case. *Id.* at 241-45, 118 S. Ct. at 1972-74. The Court emphasized that the matter had been handled by the court of appeals in a manner that indicated it was a case in that court: the matter was entered on the court of appeals' docket; it was submitted to a panel of three judges from the court of appeals, the matter was decided by an opinion; there was a dissent; the court of appeals entered a judgment and a mandate; and the court of appeals considered and rejected a motion for rehearing. *Id.* at 242; 118 S. Ct. at 1973.

Nearly all of those same events happened in this case. The petition was docketed by the clerk of the court of appeals just like any other appellate proceeding, and it was assigned a docket number by the clerk. It was submitted to a panel of three judges of the court of appeals, and the panel issued an order denying the petition. The order was entered under the court's seal, its caption indicated that it was being entered in an "Appeal from the United States District Court for the Middle District of Florida" and referred to the State as the "Appellants." The order was accompanied by a letter from the clerk stating that the panel's order "is issued as the mandate of this court." The letter advised that a motion to reconsider could be filed within 21 days, and the three-judge panel entertained and denied a motion for reconsideration.

Commentators have agreed that the reasoning in *Hohn* should apply to other cases in which the court of appeals denied permission to appeal. *See* Robert L. Stern et al., *Supreme Court Practice* § 2.2 at 71 (8th ed. 2002) (concluding in light of *Hohn* that "the Court has given a broad interpretation to the word 'cases' so as to include not only a full-blown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the imprimatur of the court of appeals"); 17 Charles Alan Wright et al., *Federal Practice & Procedure* § 4036 n.24 (3d ed. 2007) (concluding that in light of the reasoning in *Hohn*, § 1254(1) likely grants certiorari jurisdiction where the court of appeals denied leave to appeal under § 1292(b) or "any other statute requiring leave to appeal"); Scott E. Gant, *The Law of Unintended Consequences: Supreme Court*

Jurisdiction over Interlocutory Class Certification Rulings, 6 J. App. Prac. & Process 249 (2004) (arguing that the Court has jurisdiction to review district court class certification order even where the court of appeals denies permission to appeal under Fed. R. App. P. 23(f) and noting that it likely also has jurisdiction where the court of appeals denied review under § 1292(b)).

If the Court has concerns that, notwithstanding *Hohn*, it may not have jurisdiction over this case, the jurisdictional questions would be best answered at the merits stage and not at the certiorari stage, especially where, as here, both parties agree the Court has jurisdiction. *Cf. Hohn*, 524 U.S. at 240-41, 118 S. Ct. at 1972 (noting that since petitioner and respondent agreed there was jurisdiction, best course was to grant certiorari to decide question and appoint an *amicus curiae* to argue that the Court lacked jurisdiction). Because this issue, by definition, will never arise in the courts of appeals and can be decided by this Court only, the jurisdictional wrinkle actually presents an additional reason for the Court to grant certiorari.

Whether the court of appeals should have granted leave to appeal is not an issue meriting review by this Court. Section 1254(1) grants jurisdiction to this Court to review "cases" in their entirety, not just the specific ruling of the court of appeals. Thus, for example, this Court has ruled on the merits of habeas appeals even where the court of appeals denied a certificate of appealability. *E.g., Weeks v. Angelone*, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000). Indeed, so long as the case is in the court of appeals, this Court is free to review the district court's

order directly even before the court of appeals has disposed of the appeal. *See* 28 U.S.C. § 1254(1) (providing jurisdiction either "before or after rendition" of the court of appeals' decision). *See generally* Stern et al., *supra*, §§ 2.3-2.4 (compiling cases in which this Court has exercised its power to directly review district court decisions without the benefit of an opinion from the court of appeals). And, of course, this Court can review and even reject a district court's ruling even where the court of appeals summarily affirmed without an opinion. Stern et al., *supra*, § 2.2 at 73. *See also Forsyth v. Hammond*, 166 U.S. 506, 513, 17 S. Ct. 665, 668, 41 L. Ed. 1095 (1897) (noting that the similar antecedent to § 1254(1) "was intended to vest in this court a comprehensive and unlimited power" of review that "is not affected by the condition of the case as it exists in the Court of Appeals").

Thus, there is no reason for the Court to take up the question of the whether the court of appeals "abused its discretion" in denying the State's request for permission to appeal. Indeed, given the Eleventh Circuit's clear holdings in *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008), and *Holland v. McNeil*, 539 F.3d 1334 (11th Cir. 2008) (pet. for cert. pending Case No. 09-5327), *see also Melson v. Allen*, 548 F.3d 993, 1001 (11th Cir. 2008) (reiterating *Holland* standard that egregious misconduct and not simply gross negligence is required to support equitable tolling), and the egregious nature of the attorney conduct in this case, there was no reason why the Eleventh Circuit should have granted review itself. All that would have happened had the court of appeals granted the State leave to appeal is that several months would go by while the case was briefed, argued, and likely affirmed in light

of the clear holdings in *Downs*, *Holland*, and *Melson*. There is no reason for the court of appeals to further consider the equitable tolling issue before this Court decides the main question presented in the petition.

Finally, the Court should resist any temptation to wait to decide the equitable tolling issue until a final judgment is entered. While it is true that review by this Court might delay the proceedings in the district court, the State of Florida is the party who has the paramount interest in obtaining speedy resolution of capital cases. In its considered judgment, the State has decided that from a systemic point of view, that interest would best be served by the Court deciding the equitable tolling issue in this case or in *Thomas*. While Mr. Asay disagrees with the State on the merits of its argument, the State's position on the most efficient manner of determining the question should be entitled to the greatest of deference.

CONCLUSION

For the foregoing reasons, although Mr. Asay concedes that the equitable tolling issue in this case merits review and is fully prepared to defend the ruling below in this Court, the Court should grant a writ of certiorari in *McNeil v. Thomas*, Case No. 09-234, and hold this case pending until *Thomas* is decided.

Respectfully submitted,

John S. Mills
Mills Creed & Gowdy, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
jmills@appellate-firm.com
Counsel for Respondent